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CHARLES ELMORE

No. 23

In the Supreme Court of the United States

OCTOBER TERM, 1932

INTERSTATE COMMERCE COMMISSION, PUBLIC UTILITIES COMMISSIONER OF OREGON, AND PUBLIC UTILITIES COMMISSION OF THE STATE OF IDAHO, APPELLANTS

v.

OREGON-WASHINGTON RAILROAD & NAVIGATION COMPANY ET AL.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF OREGON

BRIEF FOR THE INTERSTATE COMMERCE COMMISSION

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OPINIONS BELOW

The opinion of the specially constituted District Court (R. 155), *Oregon-Washington R. & Nav. Co.* v. *United States*, is reported at 47 F. (2d) 250.

The report of the Interstate Commerce Commission (R. 50), *Public Service Commission of Oregon* v. *Central Pacific Railway Company et al.*, is published at 159 I. C. C. 630. An earlier report of the Commission, relating to the same subject matter (R. 1844), *Construction of Railroad Lines in Oregon*, is published at 111 I. C. C. 3.

JURISDICTION

In compliance with Rule 12, appellants submitted their statement showing the basis of this Court's jurisdiction in this cause. Appellee, Oregon-Washington Railroad & Navigation Company, in its "Statement Opposing Jurisdiction," challenged the jurisdiction of the Court to entertain the appeal and the standing of appellants to prosecute it. On May 23, 1932, the Court entered an order providing that "Further consideration of the question of jurisdiction of this Court in this case is postponed to a hearing on the merits." Argument upon this question is submitted herein, *infra*, pages 40–57.

QUESTIONS PRESENTED

The question presented is the validity of an order of the Interstate Commerce Commission, under paragraph 21 of section 1 of the Interstate Commerce Act, requiring that a carrier subject to that Act shall construct an extension to its existing rail facilities. This provision, added by Transportation Act, 1920, authorizes the Commission to require a railroad engaged in interstate commerce to extend its line, provided the Commission finds, after hearing, that such extension "is reasonably required in the interest of public convenience and necessity" and "that the expense involved therein will not impair the ability of the carrier to perform its duty to the public." This is the first case in which the Commission has exercised this authority.

Determination of the validity of the order depends upon the following questions:

1. Whether the provision of paragraph 21, properly interpreted, empowers the Commission to require the construction of the extension here ordered.

2. Whether the order is unconstitutional and void, as depriving the carrier of its property without due process of law.

STATUTES INVOLVED

The pertinent provisions of the Interstate Commerce Act and other statutes involved are set forth in the appendix.

STATEMENT

1. Nature of proceeding

This is a direct appeal by the Interstate Commerce Commission (hereinafter called the Commission), the Oregon Public Utilities Commissioner (successor of Public Service Commission of Oregon), and the Public Utilities Commission of the State of Idaho from a final decree (R. 166) of the District Court for the District of Oregon, specially constituted as required by the Urgent Deficiencies Act, permanently enjoining and setting aside the Commission's order.

2. The order in question

The Commission's order, dated December 3, 1929 (R. 85), directs the Oregon-Washington Railroad & Navigation Company to construct an extension of its present line from a point thereon at or near the station designated as Crane, Oreg., across central Oregon to a point of connection with the line of the Southern Pacific Company at or near Crescent Lake, Oreg.

The O.-W. R. & N., the Oregon Short Line, and the Union Pacific R. R. are parts of the Union Pacific System. The main lines of the Union Pacific R. R. extend from Council Bluffs, Ia., and Kansas City, Mo., to Ogden, Utah. The Oregon Short Line extends from a point of connection with the Union Pacific at Granger, Wyo., 844 miles west of Omaha, to Huntington, Oreg., a point on the Snake River, which there forms the Idaho-Oregon boundary. The O.-W. R. & N. extends from Huntington in a general northwesterly direction to the Columbia River, thence along the south bank of that river to Portland.[1]

Crane, Oreg., near which the required extension would begin, is on a branch line in eastern Oregon known as the Ontario-Burns branch. This branch connects with the Oregon Short Line at Ontario, Oreg., 40 miles south of Huntington, and runs in a general westerly direction to Crane, 127 miles, thence northwesterly for 30 miles to Burns, Oreg.

The extension would continue in a general westerly direction from Crane across the central portion of the state to Crescent Lake, Oreg., 185 miles.

Crescent Lake is a point on the Cascade line or "Natron cut-off" of the Southern Pacific Company about 98 miles southeast of Eugene, Oreg. The Southern Pacific Company operates lines from Ogden, Utah, and New Orleans, La., to San Francisco, Cal.,

[1] The O.-W. R. & N. also operates a line from Portland to Tacoma and Seattle, Wash., and from Messner, Oreg., 166 miles east of Portland, to Spokane, Wash. It also operates numerous branch lines. (Ex. 37.)

and from Roseville, Cal., a point on the Ogden-San Francisco line 18 miles east of Sacramento, Cal., to Portland. This latter line between Roseville and Portland has two alternate main lines between Black Butte (formerly Weed), Cal., and Eugene, Oreg. The alternate line on the west, passing through Medford, Grants Pass, and Roseburg, Oreg., was the original main line between Weed and Eugene. The other alternate line, recently constructed and known as the Cascade line, or Natron cut-off, passes through Klamath Falls, Kirk, Chemult, Paunina, Crescent Lake, the western terminus of the required extension, and Natron, Oreg. (See map, Ex. 52.)

The Oregon Short Line owns all the capital stock of the O.-W. R. & N. except 15 directors' qualifying shares, and the Union Pacific R. R. in turn owns all the capital stock of the Oregon Short Line. These three railroads, together with the Los Angeles & Salt Lake R. R., form the Union Pacific System.

The order authorizes the Union Pacific Railroad Company to join in the construction and operation of the extension and to finance it from current funds or by advances.[2]

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[2] The order contains further provisions, not presently important, that the construction of the extension be commenced on or before July 1, 1930, and completed and put in operation within three years thereafter; that the O.-W. R. & N. report to the Commission in writing the commencement and completion of such construction within 15 days after such commencement and completion, respectively; that said carrier when filing schedules establishing rates and fares applicable on said line of railroad shall in such schedules refer to the order by title, date, and docket number; and that said carrier shall report to the Commission as required by its valuation order No. 24, effective May 15, 1928.

3. The extension ordered would complete the partially constructed Oregon "cross-state" line as originally projected and surveyed

The route of the extension ordered follows the survey of a "cross-state" line projected and partially built prior to 1913, when the lines of the Union Pacific and Southern Pacific were jointly operated under the control of the Harriman interests. (R. 1856.) The cross-state line as then planned was to run from Malheur Junction, Oreg. (about two miles south of Ontario, Oreg.), to Eugene, Oreg. A part of the same plan was the construction of the Natron Cut-off between Eugene and Weed, Calif. The original line between the latter two points (the Siskiyou line) crossed the Siskiyous with heavy grades and sharp curves, and operation over that line was so difficult that a better route was desirable. (See R. 1860.)

In 1911 construction of the cross-state line was begun at both ends and continued for two years. (R. 1856.) The line on the east was built as far as Juntura, 73.6 miles west of Ontario, and construction eastward from Eugene proceeded as far as Oakridge, 40 miles. At the same time work on the Natron Cut-off commenced on the south and proceeded northward from Weed through Klamath Falls to Kirk, Oreg., 127 miles. The cross-state line would have joined with the Natron Cut-off at Odell Lake, just north of Crescent Lake.

January 6, 1913, this Court rendered its decision in *United States* v. *Union Pacific R. R. Co.*, 226 U. S.

61 and 470, holding that the control by the Union Pacific of the Southern Pacific through stock ownership was an illegal combination in restraint of interstate trade within the purview of the Sherman Anti-Trust Act of 1890.

Thereupon all work upon the above-mentioned construction projects stopped (R. 1857), leaving uncompleted and virtually useless three stub tracks, that is, the partially completed portion of the cross-state line on the east from Ontario to Juntura, the partially completed portion of the cross-state line on the west from Eugene to Oakridge, and that part of the Natron Cut-off that had been built on the southern end from Weed northward to Kirk. Had these projects been completed and joined as originally planned, they would have gone far toward supplying Oregon's great need for adequate rail transportation facilities.

Later, in 1915, the line which had been constructed from Ontario to Juntura as part of the originally projected cross-state line was extended to Riverside, 92.7 miles from Ontario, and in 1916 to Crane, 126.6 miles from Ontario. (R. 1857.)

This construction work, as far as it went, took place without the Commission's approval, for it was completed prior to the passage of the Transportation Act of 1920, which for the first time gave the Commission control over railway construction.

4. Earlier proceedings and construction work which followed

After the passage of Transportation Act, 1920, the Public Service Commission of Oregon, invoking the

provisions of paragraph 21 of section 1 in behalf of the people of the State of Oregon, filed its complaint with the Commission October 30, 1922, asserting that public convenience and necessity demanded the completion of the cross-state line and asking that the Commission require by order the construction of an extension to connect the gap between Crane and Oakridge.

The complaint further alleged that public convenience and necessity demanded the construction of adequate and efficient railroads between certain other points in Oregon for the transportation of freight and passengers. It asked that the Commission also require the completion of the Natron cut-off by the construction of an extension from a point on the Crane-Oakridge extension near Odell Lake to Kirk; that the Commission require the construction of an extension southward from Bend to Odell Lake; an extension from a point on the Crane-Oakridge extension about midway between Crane and Odell Lake southward to Lakeview, Oreg.; and an extension from Harriman, on the then existing Ontario-Crane branch 4.5 miles from Crane, to Burns, Oreg.

Shortly after the filing of the Oregon Commission's complaint the Southern Pacific agreed to the construction of the Natron cut-off, and, by application filed with the Commission March 23, 1923, asked for a certificate of public convenience and necessity under section 1 (18) of the Interstate Commerce Act authorizing the construction, which the Commission granted. *Construction of Natron Cut-off by Central*

Pacific Ry.,[3] 82 I. C. C. 185, decided August 15, 1923. The authority was conferred without limiting the scope of the relief that might be granted upon Oregon's complaint. (111 I. C. C. 3, 16; R. 1856.)

November 23, 1923, the O.-W. R. & N. Co. asked for a certificate authorizing construction of the branch from Crane to Burns. This was granted. *Construction of Extension by O.-W. R. R. & Nav. Co.*, 86 I. C. C. 264, decided January 16, 1924.

Hearings were held upon Oregon's complaint, but before decision was reached several applications were filed by the carriers proposing additional construction work and acquisitions of control, under section 1 (18) and section 5 (2) of the Act. These proposals were largely in substitution for the construction proposed in the complaint of the Oregon Commission and led the Commission to withhold its decision upon the complaint until the whole matter could be considered.

These various applications, together with the complaint of the Oregon Commission, were passed upon by the Commission in one report, *Construction of*

[3] The Central Pacific owns the lines, now operated as part of the Southern Pacific System, extending from Ogden to San Francisco and from Roseville, Calif., to Portland. The Southern Pacific controls the Central Pacific through stock ownership. This control was authorized by the Commission in *Control of Central Pacific by Southern Pacific*, 76 I. C. C. 508 (1923).

Lines in Oregon, 111 I. C. C. 3–60. This report is reproduced in the record, R. 1844–1897.[4]

All these applications, which are fully described in the report, were granted, some with conditions.

In reference to the complaint of the Oregon Commission, in so far as it sought the construction of the cross-state extension, which as then proposed would have begun on the east end at Harriman, 4.5 miles west of Crane, the Commission said:

> While the attitude of the Union Pacific system as to the cross-State line is openly adverse to the requirement that it construct such line under the present conditions of ownership of the Natron cut-off and the Willamette Valley lines, yet a careful scrutiny of its position in the light of its past construction leads to the conclusion that under appropriate circumstances it would complete that portion of its historic plan which is represented by the gap between Harriman and the cut-off. In no other way now known can its great investment from Ontario to Burns be made to yield its running and fixed costs. In this respect its situation is similar to that of the Oregon Trunk at Bend, with a high-grade line 151 miles long, an incomplete fragment of a larger plan, built on standards contemplating a greater use than it can have if unextended. But the Union Pacific is making no suggestion to us for an extension of its line; rather, as stated, it opposes an order

[4] Three supplemental reports, not in this record, are published at 117 I. C. C. 737, 124 I. C. C. 529, 138 I. C. C. 99.

> requiring it to do so. Its opposition is doubtless due in major part to its apprehensions as to the treatment it would receive in the division of traffic, if and when it should reach the Natron cut-off, which soon is to become a main line of the Southern Pacific. What the Union Pacific could be required to do, upon this record, against its protest, is one thing. Our conclusion, previously expressed, is that the record in the Oregon commission case can not be depended upon to speak clearly as to the future traffic and its financial results, because of conditions changed since that record was made. This makes it unnecessary to determine the important questions of constitutional authority and of statutory construction raised. But it is another matter as to what we should permit the Union Pacific to do upon the present record, were it convinced of the business soundness of the project for the extension of its rails, as long ago planned, to a connection with the Southern Pacific's line. We do not intimate what our determination of that question would be if an application by the Union Pacific were before us. (Rep. p. 47; R. 1885.)

The Commission deemed it appropriate, however, because of the great importance of the subject and the changes which had occurred since the Union Pacific had been before it as a defendant to the Oregon commission's complaint

> to suggest to that carrier a most careful review and resurvey of the entire situation, in the light of the known facts, our present deter-

> mination, and the policy of the law as it applies to connecting carriers. The Union Pacific has not come into the hearings upon any of the six finance applications, and what its position may be as to its duty in the development of the great section of the country under consideration, as now planned, we are not informed. In its review, it may properly take into consideration the feasibility of participation in the traffic through joint trackage arrangements with the Oregon Trunk. The president of the Great Northern Railway Company, testifying for the Oregon Trunk, strongly advocated a policy of cooperation which would result in the maximum of service with the minimum of construction. The Oregon Trunk, in brief and argument, affirmed this view. (Rep. pp. 47, 48; R. 1886.)

In summarizing the Commission's action Commissioner Woodlock in a concurring expression pointed out that "the Oregon Railroad Commission does not get its cross-State line, but it does get the material for a new and shorter route to the east by continuation of the Natron cut-off in a southeasterly direction to a connection with the Nevada-California-Oregon at Alturas"; that "the northern lines obtain entry into the Klamath Falls pine timber on the theory that a great early increase in lumber production in that district is imminent"; that "the Southern Pacific lines obtain entry into the pine timber tributary to Lakeview and Silver Lake"; and that "save for the entry of the northern lines into Klamath Falls the 'Southern

Pacific monopoly' in Oregon remains unbroken." (Rep. p. 50. R. 1888).

Commissioner McManamy vigorously dissented from the action of the Commission in denying Oregon's petition for the cross-state line. He said, in part:

> The report of the majority states that:
>
> "In a broad way, the proceedings dealt with in this report require our answer as to the railroad facilities which shall be afforded eastern Oregon and northern California."
>
> To my mind, our answer to this question does a grave injustice to the State of Oregon and fails utterly to meet the urgent requirements of the people of Oregon and southwestern Idaho for better and more direct transportation facilities. Eastern Oregon, an empire of some 33,000 square miles, lies underdeveloped because of lack of means of getting its products to market. The need for the cross-State line, as urged by the Oregon commission, has existed for many years and because of this decision it will remain unsatisfied for many years to come. Many cross-State lines have been proposed, but the one with which this case deals, proposed some 20 years ago by the Union Pacific, would leave the main line of the Oregon Short Line at Ontario, Oreg., and extend westerly with the ultimate purpose of reaching the coast and not only developing the agricultural country in the center of the State but obtaining a share of the lumber traffic which must flow from the immense bodies of standing timber east

and west of the Cascades. About 150 miles of this line was built and is now unprofitable because the original plan was not carried out After waiting all these years without any substantial increase in the railroad mileage in this portion of the State, the people of the State of Oregon, through their railroad commission, sought an order from us requiring the construction of this line in the interest of the public. * * *

Under this decision Oregon in the future, as in the past, will, so far as transportation matters are concerned, continue to be ancillary to Washington and California in that it must continue to be served by branch-line railroads connecting with trunk lines extending through those States. It must continue to suffer the delay to its products and the resulting handicap to its development resulting from the the added expense and time involved in reaching eastern markets via circuitous routes because the only east-and-west trunk line which reaches the State failed, for some reason best known to itself, to ask for a certificate of convenience and necessity to authorize it to complete plans made 20 years ago. For this, eastern and central Oregon is denied opportunity for natural development. For this, Harney and Lake Counties must continue for years to wagon their products and drive their cattle hundreds of miles to market. For this, central and western Oregon producers must continue to depend upon one railroad system. Truly they asked us for bread and we have given them a stone.

> The State commission's complaint in Docket No. 14392 should have been granted or held open for further testimony. The Union Pacific System should have been directed to formulate its plans for the construction of the cross-State project and submit them to us at such further hearing if held. All of the legal conditions antecedent to the issuance of an order for the construction of this cross-State project apparently have been met on the record. It is shown that this line is "reasonably required in the interest of public convenience and necessity" and there is no contention that "the expense involved" will "impair the ability of the carrier to perform its duty to the public." Instead of the contenting ourselves with merely granting the applications made, we should have taken constructive action upon this complaint. (Rep. pp. 53, 58, R. 1891, 1895.)

The Oregon commission filed petition for rehearing in view of the important developments and changed conditions which had occurred since the proceeding was submitted, seeking an opportunity to present new evidence, particularly as to the proposed line between Harriman and Odell. In denying this petition the Commission said that the manner in which the changed grounds of compaint of the Oregon Commission could best be dealt with

> is upon a new, clean record, based upon the conditions as they may exist at the time of hearing, * * *. The construction proposed by the carriers under the finance

> applications will serve a portion of the territory proposed to be served by the lines sought in Docket No. 14392. * * * If, after considering our views as to the disposition of the finance dockets, the Oregon commission desires to urge the building of the Harriman-Odell line, a new complaint with that object may be filed. (117 I. C. C. 742.)

Three months thereafter the Oregon commission filed its second complaint.

5. Oregon's second complaint

May 24, 1927, the Oregon Commission filed a second petition (R. 45) with the Commission (under section 13 (1) of the Interstate Commerce Act). The State of Oregon, through its Attorney General, joined in the petition. The principal railways serving the state were named as defendants, including the O.-W. R. & N. Co., the Oregon Short Line and the Union Pacific Railroad.

The petition alleged that the defendants in the past have failed and refused and still fail and refuse to provide a very large area of many thousand square miles in extent in central Oregon with adequate and reasonable facilities of transportation by railroad, although the existing line of railroad from Ontario, Oreg., to Crane, Oreg., is a part of a line of railroad projected many years ago by the Union Pacific System to extend from Ontario in a westerly direction across the state to a connection at some suitable point in western Oregon with the Southern Pacific Company; that

between Crane, in eastern Oregon, and Crescent Lake, or some point in the vicinity thereof, on the Natron Cut-off of the Southern Pacific Company, there is a practicable and feasible route for the construction of a line of railroad which, if built, would provide such facilities.

"Adequate provision without delay of such facilities is demanded by public interest, convenience, and necessity. The expense involved in the extension of lines aforesaid will not impair the ability of the defendants or any of them to perform their duty to the public," the petition also alleged.

The petition further alleged that the construction and operation of the extension sought and the establishment of through routes and joint rates thereover [illegible] necessary and desirable in the public interest, and such joint and common use of the extension should be prescribed as may be just and reasonable and as will afford adequate service and will maintain and assure maximum competition and the most efficient use of cars, equipment, and facilities.

The provision of section 1 (21) was expressly invoked, as well as other provisions of the Act, including section 1 (4), placing the duty upon common carriers to provide and furnish transportation upon reasonable request, and to establish through routes and just and reasonable rates applicable thereto, and to provide reasonable facilities for operating through routes; section 15 (3) authorizing the Commission to establish through routes, joint classifications, and joint rates, fares, or charges, applicable to the transportation of

passengers or property, or the maxima or minima, or maxima and minima, to be charged, and the divisions of such rates, fares, or charges, and the terms and conditions under which such through routes shall be operated; section 15a (3) and (4) directing the Commission to determine and make public the percentage of the aggregate property values of the carriers which will constitute a fair return thereon, and, in making such determination, to give due consideration, among other things, to the transportation needs of the country and the necessity (under honest, efficient, and economical management of existing transportation facilities) of enlarging such facilities in order to provide the people of the United States with adequate transportation.

By reason of the facts stated in the petition, it was alleged, "the defendants unlawfully and in violation of sections 1, 15, and 15a of the Interstate Commerce Act have failed and refused and still fail and refuse to give due consideration to the transportation needs of the state of Oregon and to the necessity under honest, efficient, and economical management of enlarging their existing transportation facilities in order to provide the people of the state of Oregon with adequate transportation and to that end to extend their lines and to operate the same substantially as demanded herein."

The Public Utilities Commission of Idaho and numerous chambers of commerce and traffic and trans-

portation organizations intervened in support of the complaint.[5]

6. A full hearing was accorded

The answers of the defendants (R. 1833–1844), generally speaking, denied the allegations of the petition. There was a protracted hearing at which voluminous evidence was introduced dealing elaborately and comprehensively with the subject matter of the petition and developing its various phases in great detail. The testimony covered 4,147 typewritten pages. In addition, there were 135 voluminous documentary exhibits. Thereafter, briefs were filed, a proposed report was issued, exceptions to the proposed report and replies to the exceptions were filed, and the case was orally argued before the entire membership of the Commission.

December 3, 1929, the Commission issued its report, *Public Service Commission* v. *Central Pacific Ry. Co. et al.*, 159 I. C. C. 630–667. This report in connection with the earlier report, *Construction of Lines in Oregon*, 111 I. C. C. 3, summarizes the facts.

[5] Grant's Pass Chamber of Commerce, Ontario Commercial Club, Douglas County and Roseburg Chamber of Commerce, Coos County and Coos County Chamber of Commerce, Portland Chamber of Commerce, Lane County Court, Springfield Chamber of Commerce and Eugene Chamber of Commerce, Portland Traffic and Transportation Association, Grant County, Oregon, Burns Chamber of Commerce, Harney County, Oregon, Albany Chamber of Commerce, County Court of Malheur County, Willamette Valley Lumbermen's Association, Salem Chamber of Commerce, City of Bend and Bend Chamber of Commerce, City of Prineville, Oreg., Crook County, Oreg., Prineville Business Men's Club. (R. 182, 183.)

7. The Commission's findings

The Commission said that two principal questions were presented—first, as to its authority to require the construction of the extension, and second, whether the facts of record are sufficient to justify the exercise of that authority if such has been vested in the Commission. As to the first question, the Commission concluded that section 1 (21) of the Interstate Commerce Act "plainly empowers us to authorize or require a carrier subject to the Act to extend its lines or lines. Defendants by construction endeavor to restrict our power to comparatively short extensions in territory already served by the carrier or carriers involved. There is not the slightest foundation in the language of Congress for such a limitation." (Rep. 634, R. 53–55.)

The Commission declined to pass upon the constitutionality of the statute, stating that as an administrative body it was not its province to do so. (Rep. 634, R. 53.)

The Commission's conclusion upon the first question was:

> We find that authority has been vested in us to authorize or require the construction prayed for if the conditions set out in the statute are satisfied and the facts otherwise warrant the construction. (Ref. 634, R. 55.)

(a) The Commission found that the prerequisite conditions of the statute to an order requiring the construction of an extension were fully satisfied

In reference to the second question the Commission said that two conditions must be satisfied before

the issuance of an order requiring the construction—(1) that the extension is reasonably required in the interest of public convenience and necessity, and (2) that the expense involved will not impair the ability of the carrier or carriers involved to perform their duty to the public. (Rep. 634–635, R. 55.)

The Commission reviewed at length the evidence submitted in reference to these two conditions, devoting 30 pages of its report thereto. The ultimate findings of the Commission upon these two conditions are as follows:

> We find that an extension of the rail line of the O.-W. R. & N., now terminating at or near Burns, Oreg., from, or near a station thereon designated as Crane, Oreg., to a connection with the Cascade line of the Southern Pacific at, or near, Crescent Lake, Oreg., by the Oregon-Washington Railroad & Navigation Company, is reasonably required in the interest of public convenience and necessity and that the expense involved therein will not impair the ability of the carrier or carriers involved to perform their duty to the public, and that the facts justify an order requiring such extension to be constructed. An appropriate order will be entered requiring the Oregon-Washington Railroad & Navigation Co. to construct the extension substantially as proposed by complainant and authorizing the Union Pacific Railroad Company to participate therein.
>
> As previously shown the O.-W. R. & N. is owned by the Oregon Short Line which, in turn, is owned by the Union Pacific. All

> eastbound traffic moving from and over this extension will move practically the full length of the latter carriers. Under such circumstances it would be inconsistent and contrary to fairness to consider the new construction with relation only to the O.-W. R. & N., and apart from the Oregon Short Line and the Union Pacific. In view of these facts, it is expected that the cost of the construction will be financed by the Union Pacific in a manner similar to that which it voluntarily followed in the construction of the Burns extension previously referred to. (R. 83.)

Thus the Commission's utlimate findings were, in substance, that the prerequisite conditions of the statute to an order requiring the construction of an extension were fully satisfied in this case.

The Commission further found "that the facts justify an order requiring such extension to be constructed." (Rep. 665, R. 83.)

(b) Particular findings in respect of expense involved in constructing the extension

The cost of constructing the extension, according to the estimate of the Public Service Commission of Oregon, is approximately $9,000,000, or about $49,000 per mile. According to the carrier's estimate, the cost of constructing and equipping the extension is $11,717,677, or approximately $63,340 per mile. (Rep. 664, R. 82.)

After referring to figures appearing in the annual reports of the Board of Directors of the Union Pacific Railroad Company to the stockholders of that cor-

poration for the years 1926 and 1927 (Exs. 39 and 40), which report included the operations of the four companies comprising the Union Pacific System, showing a total funded debt of $411,317,075, net income from transportation operations of $42,100,143.04 for the year 1926, and $39,483,390.26 for the year 1927, surpluses from common stock of Union Pacific Railroad of $36,977,332.54 for 1926, and $35,683,495.22 for 1927, dividends on common stock of $22,229.160 for each of the years 1926 and 1927, and surpluses, transferred to profit and loss, of $14,768,172.54 for 1926 and $13,454,335.22 for 1927, the Commission found:

> It is clear from the above that the expense involved by the construction of the extension would not impair the ability of the carrier or carriers involved to perform their duty to the public. (Rep. 665, R. 82.)

In considering the question of the expense involved in constructing the proposed extension, the Commission was unable to escape the indisputable fact that the O.-W. R. & N. is not an independent railroad but is an integral part or unit of the Union Pacific System. The Commission found as a fact that—

> The O.-W. R. & N. is a part of the Union Pacific System. The latter system embraces the Union Pacific Railroad, Oregon Short Line, O.-W. R. & N., and the Los Angeles & Salt Lake Railroad. On December 31, 1927, all of the stock, except 15 shares, of the O.-W. R. & N. was held by the Oregon Short Line.

> All of the stock of the Oregon Short Line was held by the Union Pacific. The directors of the Union Pacific are, with two exceptions, also directors of the Oregon Short Line and the O.-W. R. & N. These companies have the same president. The Union Pacific, Oregon Short Line, and the O.-W. R. & N. are parties in this proceeding and in view of the relation shown above they must for practical purposes be considered together. (Rep. 636, R. 56.)

The intimate relations of these several carriers, their interdependence, and that all are operated virtually as one railroad, is illustrated by the Commission's finding of fact that the Ontario-Burns branch, of which the ordered extension would be an elongation, while held by the O.-W. R. & N., is entirely separate therefrom and connects with and is operated under lease by the Oregon Short Line. "This branch," the Commission found, "is in reality owned by the Union Pacific through the ownership of the Oregon Short Line and, in turn, the ownership of the O.-W. R. & N. by the Oregon Short Line. Only in the most technical sense could an extension of the Ontario-Burns branch to Crescent Lake be considered an extension of the O.-W. R. & N. apart from the Oregon Short Line and the Union Pacific Railroad." (Rep. 636, R. 56.)

In view of these facts the Commission considered the question of the expense involved, whether it will impair the ability of the carrier to perform its duty to the public, from the standpoint of the Union

Pacific System, and not from the standpoint of the O.-W. R. & N. viewed as an independent railroad contrary to the fact.

The annual reports of the Union Pacific for the years 1926 and 1927, from which the above-quoted figures were taken, were introduced in evidence in the Commission proceeding as Exhibits Nos. 39 and 40. The opening paragraph of the 1926 report reads as follows:

> The Board of Directors submits the following report of the operations and affairs of the Union Pacific Railroad Company for the calendar year ended December 31, 1926, *including* the Oregon Short Line Railroad Company, whose entire Capital Stock is owned by the Union Pacific Railroad Company, the Oregon-Washington Railroad & Navigation Company, whose entire Capital Stock (except fifteen qualifying shares held by Directors) is owned by the Oregon Short Line Railroad Company, and the Los Angeles & Salt Lake Railroad Company, whose entire capital stock is owned, one-half each, by the Union Pacific Railroad Company and the Oregon Short Line Railroad Company. For convenience, the four companies are designated by the term "Union Pacific System."

(A similar declaration appears in the 1927 report.)

The figures appearing in the following tabulation, copied from the Commission's report (R. 82) were

taken from these annual reports of the Union Pacific R. R. Co.:

	1927	1926
1. Capital stock outstanding in the hands of the public:		
Common stock	$222, 293, 100. 00	
Preferred stock	99, 543, 500. 00	
Total	321, 836, 600. 00	
2. Total funded debt	411, 317, 075. 00	
3. Excluding all offsetting accounts between the Union Pacific Railroad Co., Oregon Short Line Railroad Co., Oregon-Washington R. R. & Navigation Co., and Los Angeles & Salt Lake Railroad Co.		
(a) Net income from transportation operations	39, 483, 390. 26	$42, 100, 143. 04
(b) Total income	57, 919, 019. 83	59, 229, 806. 61
(c) Fixed and other charges	18, 253, 784. 61	18, 245, 057. 43
(d) Net income from all sources	39, 665, 235. 22	40. 984, 749. 00
(e) Dividends on preferred stock	3, 981, 740. 00	3, 981, 740. 00
(f) Sinking-fund requirements		5, 676. 00
(g) Surplus for common stock of Union Pacific Railroad	35, 683, 495. 22	36, 997, 332. 54
(h) Per cent earned on par value	16. 05	16. 64
(i) Dividends on common stock	22, 229, 160. 00	22, 229, 160. 00
(j) Surplus transferred to profit and loss	13, 454, 335. 22	14, 768, 172. 54

Following this tabulation the Commission made the finding above quoted that the expense involved in the construction of the extension would not impair the ability of the carrier or carriers involved to perform their duty to the public.

The construction of the Burns extension, referred to above, was authorized by the Commission January 16, 1924, in *Construction of Extension by O.-W. R. R. & Nav. Co.*, 86 I. C. C. 264. At that time the branch of the O.-W. R. & N. extending westerly from Ontario, Oreg., ended at Crane, Oreg., 125 miles. The O.-W. R. & N. filed an application with the Commission under section 1 (18) for a certificate that the present and future public convenience and necessity required the construction

by it of an extension of the Ontario-Crane branch to the City of Burns, a distance of approximately 30 miles, all in Harney County, Oreg. As represented by the applicant in that proceeding and as found by the Commission in its report therein (ibid., 265):

> The cost of construction will be financed from current funds or by advances to be made by the Union Pacific Railroad Company, which owns all of the capital stock of the Oregon Short Line Railroad Company.

It was further stated in the report in that case that "the equipment necessary to handle the traffic will be furnished by the Oregon Short Line," and that "it is not expected that the extension will be profitable in itself, but as a feeder of the Union Pacific System it will probably earn a fair return on the investment."

It was in view of the precedent established in that case that the Commission in its order in the present case authorized the Union Pacific Railroad Company to join in the construction and operation of the Crane-Crescent Lake extension and to finance it from current funds or by advances.

(c) Findings in respect of probable traffic over extension

Painstaking estimates as to the amount of traffic potentially and probably available for movement over the proposed extension were made and submitted by the parties. In important instances they were in conflict which could be reconciled only by

remembering, as the Commission said, "that they are estimates, with many problematical factors and variables upon which judgments may well differ."

The evidence as to the probable traffic, which was voluminous and of a most comprehensive character, is reviewed in the merest outline in the Commission report, beginning on page 639 (R. 59) under the heading "Traffic Estimates of Complainant and Interveners," extending through page 664 (R. 82).[6] Only the ultimate findings or conclusions are here stated.

After noting "the difficulty in estimating development which will follow the construction of an extension into this virgin territory," the Commission made reference to the following matters; first, that "in neither the estimates of complainant nor defendants is any consideration given to the development which would follow short extensions or branches from the proposed construction. It is not reasonable to presume that such branches would not be constructed"; second, that "little attention has been given to traffic moving from the East to western Oregon and which would logically move via the proposed route"; third, that "there is also substantial evidence that construction of feeder lines by other companies in western

[6] Although 25 pages of the report are devoted to a statement and discussion of the probable traffic which will originate on, be delivered to, or move over the extension, manifestly such brief treatment could consist of no more than a bare statement of the ultimate facts, without the persuasive details and supporting subordinate facts fully developed in the large record.

Oregon would follow construction of the proposed extension and that such lines would bring to the proposed line considerable traffic." Then the Commission expressed the following conclusion in respect of complainant's traffic and revenue estimates:

> When consideration is given to these matters we think complainant's estimates of probable traffic and revenues are lower than would actually follow after a reasonable development period. (R. 80.)

The Commission made the following important observation concerning eastbound traffic from western Oregon:

> It does seem reasonable to assume that a substantial volume of western Oregon traffic will move to the east via the proposed line when consideration is given to the shortened mileage and the savings which it is shown can be brought about in transportation costs through the use of this route. (R. 80.)

The Commission's final conclusion in respect of probable traffic over the extension and the revenues to be derived therefrom are as follows:

> After careful consideration of complainant and interveners' traffic and revenue estimates, and of defendants' criticisms thereof, we are firm in the belief that the extension would be a valuable asset to the Union Pacific system and would be an effective feeder for that system after a reasonable development period. At the same time the construction would bring about development in a vast territory. It would be of material benefit to the present Ontario-Burns branch. (R. 80.)

8. Proceedings in court below

Petition to set aside, enjoin, and restrain the Commission's order of December 3, 1929, was filed in the court below May 28, 1930. (R. 2.) It named the United States as the sole defendant. The Interstate Commerce Commission intervened as a party defendant by entering the appearance of its counsel, in accordance with Section 212 of the Judicial Code. (36 Stat. 1150, section 45a, title 28, U. S. Code, Supplement V.) (R. 105–106.) The Public Service Commission of Oregon and the Public Utilities Commission of the State of Idaho also intervened as parties defendant. (R. 101–105.) The Southern Pacific Company intervened as a party plaintiff (R. 92–101), as did the Great Northern Railway Company and its subsidiaries the Oregon Trunk Railway and the Oregon Electric Railway Company. (R. 106–111) The United States and the Interstate Commerce Commission filed separate answers (R. 111–114; 114–116) and the Public Service Commission of Oregon and the Public Utilities Commission of the State of Idaho filed a joint answer. (R. 117–149.)

Hearing before three judges was had September 29, 1930. It was reheard December 9, 1930, owing to the death of one of the judges, and again January 22, 1931, owing to the death of another judge. A certified copy of the testimony and exhibits before the Interstate Commerce Commission was introduced in evidence, together with seven other exhibits. (R. 180–181.)

January 29, 1931, the court rendered its opinion (R. 155–164) and findings of fact and conclusions of law (R. 164–166).

Final decree enjoining, setting aside, and annulling the Commission's order was entered January 29, 1931. (R. 166–168.) From the decree direct appeal to this Court was taken by the Interstate Commerce Commission, Public Utilities Commissioner of Oregon (successor of Public Service Commission of Oregon) and Public Utilities Commission of the State of Idaho. (R. 168–171.) The United States did not join in the appeal and summons and severance was filed. (R. 171–172.)

SPECIFICATION OF ERRORS TO BE URGED

The following errors of the District Court are urged herein:

1. In setting aside, annulling, and permanently enjoining the Commission's order of December 3, 1929.

2. In holding that the order in question exceeds the authority of the Commission and is void.

3. In holding that because "one of the dominant purposes of the order complained of was to require the petitioner to construct a line of railroad 185 miles in length in order that lumber traffic originating perhaps hundreds of miles from its present lines might find a shorter route to eastern markets, and that traffic from southwestern Idaho might find a shorter route to northern California points," the carrier "was plainly required to devote its property to a service which it has never professed to render and to a

service entirely beyond the scope of the undertaking which it has expressly or impliedly assumed."

4. In holding that the Commission misconstrued Section 1 (21) of the Interstate Commerce Act.

5. In holding that "the provision of the Transportation Act of 1920 authorizing the Interstate Commerce Commission to require carriers to extend their line or lines (Section 1 (21) of the Interstate Commerce Act) is unconstitutional and void if it must be construed broadly and liberally, as was done by the Commission in the present case."

6. In holding that the construction placed by the Commission on Section 1 (21) of the Interstate Act is neither necessary nor permissible.

7. In not dismissing the petition.

SUMMARY OF ARGUMENT

Jurisdiction of Court over the appeal

I. Under the applicable statutes, this Court has jurisdiction over, and the appellants have the right to prosecute this appeal. The sole ground of the alleged lack of jurisdiction is that the United States did not join in the appeal. But it appears that the applicable statute gives the appellants the right to prosecute this appeal independently of the United States. In framing the statute Congress carefully preserved the right of the Commission, of complainants in proceedings before the Commission, and of any party or parties in interest to the proceeding before the Commission, to appear as parties to suits to enjoin and set aside orders of the Commission of their own motion *and as of right.* The

statute also provided for direct appeal to this Court, not by the United States alone, but by any aggrieved party. Here the Commission is an aggrieved party because its order is set aside and the Oregon and Idaho commissions are aggrieved because of their substantial interest in the subject matter.

On the merits

I. Section 1 (21) of the Interstate Commerce Act, in unambiguous terms, empowers the Commission to issue an order requiring any interstate common carrier by railroad to extend its line or lines subject to two limitations, namely, that the extension is reasonably required in the interest of public convenience and necessity and that the expense involved will not impair the ability of the carrier to perform its duty to the public. Paragraphs 18–20 of section 1 confer a negative or restraining power, preventing voluntary action by carriers in the construction or extension of lines except where the Commission finds it to be in the interest of public convenience and necessity. Paragraph 21 contemplates construction of extensions of existing lines of railroad, demanded by public convenience and necessity, which the carriers are unwilling to construct voluntarily, and confers affirmative power upon the Commission, when it finds the conditions of the paragraph satisfied, to require such extensions. Paragraph 22 makes it clear that the authority of the Commission over either voluntary or compulsory extensions embraces more than merely spur, industrial, team, switching, or side tracks.

Other provisions of the Act authorize the Commission to require construction. Section 6 (13) confers power to require the construction of a track connecting the lines of a rail carrier with the dock of a water carrier; section 1 (9) authorizes the Commission to require construction of switch connections with lateral branch lines of railroads, and under the Commission's general authority it may require constructions of tracks connecting the main lines of interstate railroads.

II. An interpretation of the compulsory extension provision broad enough to embrace such an extension as here ordered is in strict conformity with the Commission's recommendation for enactment of the provision and does not give the provision a larger import in the law than it had in the recommendation. The Commission recommended, among other things, that the Act be amended limiting railway construction to the necessities and convenience of the government and of the public, *and assuring construction to the point of these limitations.* As a result of this recommendation paragraphs 18–20 were enacted which do limit railway construction to the extent indicated and paragraph 21 was enacted which assures construction to the point of those limitations. In respect of undeveloped territory the thought underlying the recommendation was that a railroad that had been permited to build into a given territory should be required to properly serve and develop that territory.

III. The facts developed in the exhaustive record before the Commission demonstrate the public con-

venience and necessity for the extension, and fully justify the order requiring its construction. The extension will aid in more adequately serving and developing a large area in eastern and central Oregon that is now either wholly unserved or inadequately served by existing railroad lines. This area is probably the largest within the United States that is without rail facilities. The construction of the extention would provide shorter routes which would make it possible to ship perishable commodities to available markets. Joining the lines of the Southern Pacific on the west with those of the Union Pacific on the east, the extension would afford a new, shorter, more expeditious and more economical transcontinental route between western Oregon and the East. With the resulting shorter routes to Pacific Coast markets, the extension across central Oregon would be of great advantage to southwestern Idaho. This section looks principally to California for markets. The present routes from southwestern Idaho to California are circuitous. Quicker transportation and shorter routes, afforded by the extension, would be of much advantage in the transportation and marketing of the products of the Umpqua and Rogue River Valleys, and indeed all western Oregon. The extension would tend to aid the development of the Coos Bay territory. It would aid in preventing and relieving car shortages which have at many times in the past retarded Oregon's industrial activity and development. The extension would aid Oregon in marketing its vast stands of virgin timber, huge tracts

of which are now deteriorating and going to waste because of the lack of adequate transportation facilities. With the diminution of timber in the southern states, the supply of standing timber in Oregon must be looked to by the whole country as of increasing and prime importance. The construction of the extension will aid in the development of the State of Oregon as a whole and will result in all rail facilities in the state enjoying increased traffic.

IV. The extension here required by the Commission's order is one reasonably necessary to reach communities and industries in the territory which the carrier has professed to serve.

Extensions of gas, electric light, water and telephone service have been often required by state commissions, provided the community to be served is within the territory covered by the utility's franchise. *New York & Queens Gas Co.* v. *McCall*, 245 U. S. 345; *New York ex rel.* v. *Pub. Serv. Comm.*, 269 U. S. 244. Railroads are not given franchises conferring upon them the right to serve exclusively any particular territory, but nevertheless a railroad owes a duty to the territory through which it has been given a franchise to build. Moreover, the Transportation Act places a duty upon railroads, in the interest of public convenience and necessity, to adequately serve and develop the territory through which their lines run.

V. The provision under which extensions of rail lines may be required in cases where the specified conditions are fully met is one of many provisions of

Transportation Act, 1920, *in pari materia*, having for their ultimate purpose the development and maintenance of an adequate national transportation system. The provision is therefore a valid exercise of the plenary power of Congress to regulate interstate commerce. *Railroad Comm.* v. *Southern Pac. Co.*, 264 U. S. 331, 344; *Alabama Ry.* v. *Jackson Ry.*, 271 U. S. 244, 249; *Wisconsin R. R. Comm.* v. *C. B. & Q. R. R. Co.*, 257 U. S. 563; *Dayton-Goose Creek Ry.* v. *United States*, 263 U. S. 456, upholding the constitutionality of the recapture clause of section 15a; *New England Divisions Case*, 261 U. S. 184, sustaining an order of the Commission which granted increased divisions to the New England lines, in order to maintain them in effective operation as part of an adequate transportation system, following rate increases made in pursuance of section 15a; *Texas* v. *Eastern Tex. R. R. Co.*, 258 U. S. 204; *Ches. & Ohio Ry.* v. *United States*, 283 U. S. 35, 42; *Texas & Pac. Ry. Co.* v. *Gulf, Colorado & Santa Fe Ry.*, 270 U. S. 266.

Public convenience and necessity may demand that one road serve a particular territory. When this is true the Commission may prevent the building of competing lines. Yet the territory may be inadequately served. If so the Commission may require the carrier occupying the territory to extend its lines. The provision for compulsory extensions is therefore a desirable, perhaps necessary, corollary of the power to restrain and forbid voluntary constructions. The

Act gives the Commission complete authority over railway construction.

If and when present consolidation plans are consummated the provision for compulsory extensions may rise to much greater importance, since consolidation into a limited number of systems will necessarily result in certain systems being given virtual monopolies in particular territories.

VI. The extension ordered is such an enlargement of transportation facilities as is contemplated by the Act, provision for which is made by rate adjustment to yield revenue sufficient to provide a return fixed at a level which takes into consideration the necessity of providing adequate national transportation service. Section 15a provides for adjustment of the rates in order to yield a fair return. In fixing the fair return the Commission is directed to give due consideration, among other things, to the transportation needs of the country and the necessity of enlarging existing transportation facilities in order to provide the people of the United States with adequate transportation. The extension here ordered is obviously an enlargement of existing transportation facilities such as contemplated in section 15a. The Commission granted rate increases ranging from 25 to 40 per cent. Since the underlying purpose of section 15a was to maintain and enlarge the transportation facilities of the country in order to provide the people of the United States with adequate transportation, it is obvious that the rate increases granted pursuant to the section had the purpose in view of providing a return

sufficiently high to provide the capital necessary to pay for such facilities. *New England Divisions Case, supra; Dayton-Goose Creek case, supra.*

VII. The requirement here in question, considered with regard to the interests both of the carrier and of the public, is reasonable and appropriate, meets the test of constitutional validity laid down by this Court in cases which reviewed state commission orders, and does not take the carrier's property. *Atchison Ry.* v. *Railroad Comm.*, 283 U. S. 380; *Wisconsin, Minn. & Pac. R. R.* v. *Jacobson*, 179 U. S. 287; *Chicago & N. W. Ry. Co.* v. *Ochs*, 249 U. S. 416; *Phoenix Ry.* v. *Geary*, 239 U. S. 277; *Minneapolis & St. L. R. R.* v. *Railroad Comm.*, 193 U. S. 53; *Mo. Pac. Ry.* v. *Kansas*, 216 U. S. 262; *N. & W. Ry.* v. *Pub. Serv. Comm.*, 265 U. S. 70.

(a) It was affirmatively shown that a large traffic is avialable for movement over the extension ordered, and that the construction of it will create additional traffic, and the Commission found that the extension would be a valuable asset to the Union Pacific system. The validity of the order is not dependent upon the profitableness of the extension, considered separately from the remainder of the transportation system of which it will form a part. *Atlantic Coast Line* v. *N. Car. Corp. Comm.*, 206 U. S. 1; *Mo. Pac. Ry.* v. *Kansas, supra; Phoenix Ry. Co.* v. *Geary, supra; Ches. & Ohio Ry.* v. *Pub. Serv. Comm., supra.*

ARGUMENT

Jurisdiction of Court over the appeal

I. Under the applicable statutes, this Court has jurisdiction over, and the appellants have the right to prosecute, this appeal

Because the question of jurisdiction was left open and because of the importance of the question, which has not heretofore been raised, it seems appropriate to submit full argument upon it.

There is no contention that the appeal was not taken seasonably nor that any of the rules of the Court or provisions of law relating to appeals in cases of this character were not complied with, but the sole ground of the alleged lack of jurisdiction is that the United States did not join in the appeal. It is true, as said in our Statement of Jurisdiction, that "The United States, one of the defendants below, did not join in the appeal," and that "summons and severance was served." (R. 171.)

But it appears, clearly we think, that the applicable statute gives the appellants the right to prosecute this appeal independently of the United States.

The Commerce Court Act (June 18, 1910, c. 309, 36 Stat. 539), in sections 1–6, created the Commerce Court, provided for the procedure in that court and for direct appeal to this Court.[7] The Urgent Deficiencies Act of Oct. 22, 1913, c. 32, 38 Stat. 208, 219, 220, under which this suit was brought, abolished the

[7] These sections were codified, without material change in substance but with some rearrangement, in Chap. IX, sections 200–214, of the Judicial Code, approved Mar. 3, 1911, 36 Stat. 1146.

Commerce Court and transferred its jurisdiction to the several district courts. It provided that "the procedure in the district courts in respect of cases of which jurisdiction is conferred upon them by this Act shall be the same as that heretofore prevailing in the Commerce Court" and repealed then existing laws or parts of laws only to the extent they were "inconsistent with the foregoing provisions relating to the Commerce Court." The provisions of the Urgent Deficiencies Act and so much of the Commerce Court Act as remains in force now appear in the U. S. Code, as amended by Supplement V, in Title 28, sections 41 (27) and (28), 43, 44, 45, 45a, 46, 47, 47a, and 48.

Prior to the Commerce Court Act, suits to enjoin orders of the Commission were brought against the Commission *eo nomine* and appeals to this Court were prosecuted by and in the name of the Commission. *Interstate Commerce Commission* v. *Goodrich Transit Co.*, 224 U. S. 194, *Interstate Commerce Commission* v. *Chicago, R. I. & P. Ry. Co.*, 218 U. S. 88.

Section 4 of the Commerce Court Act (sec. 211, Judicial Code; U. S. Code, Title 28, sec. 48) provides—

> That all cases and proceedings in the commerce court which but for this Act would be brought by or against the Interstate Commerce Commission shall be brought by or against the United States, and the United States may intervene in any case or proceeding in the commerce court whenever, though it has not

been made a party, public interests are involved.

Section 5 of that Act (sec. 212, Judicial Code; U. S. C., Sup. V, Tit. 28, sec. 45a) provided that "the Attorney General shall have charge and control of the interests of the Government in all cases and proceedings in the commerce court, and in the Supreme Court of the United States upon appeal from the commerce court," but this was subject to the proviso—

> That the Interstate Commerce Commission and any party or parties in interest to the proceeding before the commission, in which an order or requirement is made, may appear as parties thereto of their own motion *and as of right*, and be represented by their counsel, in any suit wherein is involved the validity of such order or requirement or any part thereof, and the interest of such party; * * * . (Italics ours here and in subsequent quotations.)

And it was subject to the further proviso—

> That communities, associations, corporations, firms, and individuals who are interested in the controversy *or question* before the Interstate Commerce Commission, or in any suit which may be brought by any one under the terms of this Act, or the Acts of which it is amendatory [8] or which are amendatory of it, relating to action of the Interstate Commerce Commission, may intervene in said suit or

[8] The Act, in addition to creating the Commerce Court, made important amendments to the Act to regulate commerce.

> proceeding at any time after the institution thereof, *and the Attorney General shall not dispose of or discontinue said suit or proceeding over the objection of such party or intervenor aforesaid, but said intervenor or intervenors may prosecute, defend, or continue said suit or proceeding unaffected by the action or nonaction of the Attorney General of the United States therein.*

In the last paragraph of Section 5 (sec. 213, Jud. Code; U. S. C., Sup. V, Tit. 28, sec. 45a) it is provided that:

> Complainants before the Interstate Commerce Commission interested in a case shall have the right to appear and be made parties to the case and be represented before the courts by counsel under such regulations as are now permitted in similar circumstances under the rules and practice of equity courts of the United States.

Section 2 of the Commerce Court Act (sec. 210, Jud. Code, U. S. C., Sup. V, Tit. 28, sec. 47a) provided—

> That a final judgment or decree of the commerce court may be reviewed by the Supreme Court of the United States if appeal to the Supreme Court be taken *by an aggrieved party* within sixty days after the entry of said final judgment or decree * * *.

Thus, the statute gave to (1) the Interstate Commerce Commission, (2) any party in interest to the proceeding before the Commission in which an order or requirement is made, and (3) complainants before

the Commission interested in a case, the right to become *parties* to the suit involving the validity of the Commission's order, gave the right to other interested parties to *intervene* in any such suit, provided that the Attorney General shall not dispose of or discontinue said suit or proceeding over the objection of such party or intervenor, "but said intervenor or intervenors may prosecute, defend, or continue said suit or proceeding unaffected by the action or nonaction of the Attorney General," and provided for direct appeal to this Court by any aggrieved party.

We submit that these provisions furnish clear and ample authority for the appeals in this case. The appellant, Interstate Commerce Commission, in accordance with these provisions, entered its appearance in the court below "as a party defendant." (R. 105–106.) The appellants Public Utilities Commissioner of Oregon and the Public Utilities Commission of the State of Idaho, intervened in the court below as parties defendant. (R. 101, 105.) The Public Service Commission of Oregon (which was succeeded by the Public Utilities Commission) was the *complainant* in the proceeding before the Interstate Commerce Commission which resulted in the order complained of in this suit. (Exhibit A to petition, R. 45.) The Oregon Commission would therefore come into the case both as a *party in interest* under the first proviso of section 5, above quoted, and as *complainant* under the authority of the last paragraph of that section, *supra*. The Public Utilities Commission of Idaho was a party to the proceed-

ing before the Interstate Commerce Commission, having intervened therein (R. 52, 182), and would come into the court case as a *party in interest.* The three commissions were therefore parties defendant in the suit. The court below decided the case adversely to them, holding that the order of the Interstate Commerce Commission, which the Oregon and Idaho commissions had sought, was invalid. Thus, the three commissions were aggrieved parties, and under section 2, quoted above, had the right to obtain a review of the final decree of the court below by appeal to this Court. The Interstate Commerce Commission is aggrieved, within the meaning of this statute, when its order is set aside. Here the State commissions are aggrieved also, for their interest in the provision of adequate and economical transportation service for the States of Oregon and Idaho is substantial. The order of the Interstate Commerce Commission vitally affects the interests of the two States, of which the Oregon and Idaho commissions are representatives, and it may not be supposed that Congress intended that the presentation and protection of such interests were to be committed to the Attorney General of the United States. It would seem to be an unreasonable construction of the statute to say that the commissions were without right of appeal to this Court, to obtain a final determination of the validity of the order of the Interstate Commerce Commission, solely because the United States refused to join in the appeal.

Special provision was made for notice to the Commission of suits to set aside its orders. Section 1 of the Commerce Court Act (sec. 209, Jud. Code, U. S. C., Tit. 28, sec. 45) provided that a copy of the petition shall be forthwith served, by the proper marshal, "upon every defendant therein named," and

> when the United States is a party defendant, the service shall be made by filing a copy of said petition in the office of the Secretary of the Interstate Commerce Commission and in the Department of Justice.

The Commission is often named with the United States as a defendant in these suits but when it is not, it yet must be given notice of the suit, as required by the provision just quoted, and this provision, together with that previously quoted, providing that the Commission may appear as a party to the suit of its own motion and as of right and be represented by its counsel, seems clearly to evince the Congressional intention that the Commission may, if it is so advised, conduct its own independent defense of its orders in the courts. The above-quoted provision giving the Commission and parties in interest the right to "continue said suit or proceeding unaffected by the action or nonaction of the Attorney General," together with the provision for direct appeal, seems clearly to give the Commission the right to pursue the case to its final determination in this Court.

As originally introduced, the bill (H. R. 17536, 61st Cong., 2nd Sess.), in section 5, provided that the

Interstate Commerce Commission and its attorneys should take no part in the conduct of cases to review its orders. This provision was short-lived, for it was stricken out in committee. A provision that the Attorney General was to have complete control of these cases met with strenuous objection and was modified. The minority committee report (House Rept. No. 923, p. 158) had the following to say on this subject:

> We object to the fourth and fifth sections of the bill because they practically transfer the important and essential work of the Interstate Commerce Commission to the Department of Justice. The commission is now, and was intended to be from its organization, an independent tribunal of the rights of the people and the carriers. * * *
>
> If the Attorney General should be led to believe that the commission had made any kind of a mistake in the order made fixing a reasonable rate, then the Attorney General could direct the abandonment of the case. * * *

When section 5 of the bill was under consideration in the House, Mr. Pickett offered an amendment, which he explained as follows, and which was carried (Cong. Rec., Vol. 45, Part V, p. 5524):

> Mr. Pickett: Mr. Chairman, section 5 as it now stands gives the Attorney-General charge and control of the interests of the Government in all cases and proceedings in the commerce court and on appeal in the Supreme Court. It then provides that parties in interest to a proceeding before the Interstate Commerce Com-

mission in which an order is made may appear and be represented by their counsel in a suit questioning such order or involving the interest of such party, subject, however, to the limitation that the right to appear and be represented shall be "upon such terms as the court may prescribe," and the further limitation contained in the clause in lines 16, 17, and 18, as follows:

"But such appearance and representation shall not interfere with the control of the case by the Attorney-General."

The purpose of the proposed amendment is to remove these limitations. The right of a party in interest to appear and be represented by counsel should be absolute. The provision in lines 18 to 22, inclusive, gives the commerce court the power to make rules regulatory of the number of counsel, the method of procedure, and so forth. This would appear to be a sufficient safeguard. The court, however, in my judgment, would have the power to do so without such provision. The appearance of a party in interest and the conduct of the case, so far as the protection of the rights of such party are concerned, should not be subject to the control of the Attorney General. If the proposed amendment is adopted, the section would give the Attorney General charge and control of the interests of the Government, and would leave to a party in interest the right to control the presentation of his case.

* * * If an individual shipper or one of these associations of shippers files a complaint with the Interstate Commerce Commission,

employs counsel to investigate, prepare, and present the case, and secure a favorable order, and the railroad against which the order is made seeks to enjoin or set it aside, such shipper or association of shippers should have the right to follow the case *through the commerce court and Supreme Court*, if it should go there, and present and submit the case, so far as complainant's interests are concerned, on their own theory, the same as a party in interest may do under the universal practice in our courts.

A party litigant should always have the right to follow his case to final judgment. This right should not be impaired in the proposed measure. The shippers of the country are vitally interested in this bill; the question of freight rates is one of great importance; the rights and interests of shippers should be carefully safeguarded. The adoption of the amendment which I have offered will protect the right of a party in interest—the shipper who has filed his complaint with the Interstate Commerce Commission and secured a favorable order—to follow his case with his own counsel and according to his own theory of the case, so far as his interests are concerned, until final judgment or decree is rendered. It seems to me the justice and fairness of this proposition can not be controverted.

Immediately after the adoption of this amendment, Mr. Norris proposed an amendment to allow the Interstate Commerce Commission to also appear as

a party in any suit. Concerning this amendment he said (Cong. Rec. Vol. 45, Part 5, p. 5524):

> Mr. NORRIS. Mr. Chairman, it seems to me now since it has been determined that these suits shall be brought in the name of the United States and against the United States, there ought to be a concession made, at least to this extent, that the Interstate Commerce Commission shall have the right, if they desire so to do, to appear by their attorneys in this court as opposed to the suit. Now, that is all that this amendment seeks to provide.
>
> Mr. TOWNSEND.[9] I have not the slightest objection to that.
>
> Mr. MANN. As far as I am concerned, I would state that I have no objection to it [Mr. Mann was chairman of the committee reporting the bill.]
>
> Mr. NORRIS. Then, Mr. Chairman, I call for a vote.
>
> The CHAIRMAN. The question is on the amendment offered by the gentleman from Nebraska.
>
> The question was taken, and the amendment was agreed to.

Section 5 as passed by the House, was as follows:

> SEC. 5. That the Attorney General shall have charge and control of the interests of the Government in all cases and proceedings in the commerce court, and in the Supreme Court of the United States upon appeal from the com-

[9] Mr. Townsend was the sponsor of the bill, having introduced it in the House.

merce court; and if in his opinion the public interest requires it, he may retain and employ in the name of the United States, within the appropriations from time to time made by the Congress for such purposes, such special attorneys and counselors at law as he may think necessary to assist in the discharge of any of the duties incumbent upon him and his subordinate attorneys; and the Attorney General shall stipulate with such special attorneys and counsel the amount of their compensation, which shall not be in excess of the sums specifically appropriated therefor by Congress for such purposes, and shall have supervision of their action: *Provided*, That the Interstate Commerce Commission and parties in interest to the proceeding before the commission, in which an order or requirement is made, may appear as parties thereto, and be represented by their counsel, in any suit wherein is involved the validity of such order or requirement or any part thereof, and the interest of such party; and the court wherein is pending such suit may make all such rules and orders as to such appearances and representations, the number of counsel, and all matter of procedure, and otherwise, as to subserve the ends of justice and speed the determination of such suits.

Meanwhile, the Senate had been considering its own bill, S. 6737, of like character. As in the House, there was a vigorous objection in the minority report against exclusion of the Interstate Commerce Commission from representation in suits. (Senate Rept.

355, Part 2, pp. 5, 6, 7, 61st Cong., 2nd Sess.) While the bill was under consideration Senator Elkins, Committee Chairman, offered an amendment providing that complainants before the Interstate Commerce Commission interested in a case shall have the right to appear and be made parties to the case. Some amendments were offered respecting the phraseology, which were accepted by Senator Elkins and the amendment was agreed to by the Senate. (Cong. Rec. Vol. 45, Part 5, pp. 4604, 4607.)

What is now the second proviso was the result of a substitute offered by Senator Smith of Michigan to an amendment proposed by Senator Cummins. This substitute proposed the adoption of section 5 of H. R. 17536 as passed by the House in lieu of Section 5 of the Senate bill, with the addition that the parties in interest should be notified of the commencement of the suit. (Cong. Rec. Vol. 45, Part 6, p. 6406).

While the amendment was pending the following occurred (p. 6445):

> Mr. SMITH of Michigan. I should like to add, after the word "and," in line 5, page 2, before the word "parties," the words "any party or," so that the proceeding may not be discontinued by collusion or settled as to a part of the parties and not as to the others, *and so that whoever remains in the case may take the issue to its final conclusion.* I should like to have my amendment changed in that respect.
>
> The PRESIDENT pro tempore. The Senator from Michigan modifies his amendment, as will be stated:

The SECRETARY. On page 2 of the printed amendment, in line 5, between the word "and" and the word "parties," insert the words "any party or," so that the proviso will read:

"*Provided*, That the Interstate Commerce Commission and any party or parties in interest to the proceeding before the commission"——

Mr. SMITH of Michigan. *I propose to add also that in the event of the absence or failure of the Attorney General to conduct the proceedings any party in interest may do so to their final conclusion.*

Mr. CUMMINS. Where is the modification just mentioned to be inserted?

Mr. SMITH of Michigan. I thought I would put it after "counsel." I do not know but the language is better expressed in the suggestion of the Senator from Colorado, if he will permit me to offer it.

Mr. HUGHES. I send the amendment to the desk.[10]

The PRESIDENT pro tempore. Does the Senator from Michigan desire further to modify his amendment?

Mr. SMITH of Michigan. In this particular, if I may be permitted to do so without changing the parliamentary status of my motion.

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[10] This amendment of the Senator from Colorado which Senator Smith used to perfect his amendment is what appears as the second proviso of section 5, permitting interventions and providing that the parties or interveners may continue the suit notwithstanding nonaction of the Attorney General.

The PRESIDENT pro tempore. The Senator can modify his amendment until another amendment has been acted upon.

Mr. SMITH of Michigan. With the consent of the Senator from Colorado, I will offer his amendment as my own.

Mr. ELKINS. As a part of your amendment.

Mr. SMITH of Michigan. As a part of my amendment.

Mr. ELKINS. To perfect your amendment.

Mr. SMITH of Michigan. Yes.

* * * * * *

Mr. SMITH of Michigan. I think it is desirable that some provision shall be made in section 5 for the conduct of this litigation *to its conclusion by some one other than the Attorney General, if the Attorney General fails to proceed with this defense.* * * * To that end I have provided an amendment which I desired to offer by way of perfecting the amendment now pending.

* * * * *

Mr. CUMMINS. I should like to inquire of the Senator from Michigan whether it is his intent by the modification he has just proposed to repeal or strike out that part of the section which was adopted a few weeks ago by the Senate with respect to the appearance in these suits on the part of complainants before the Interstate Commerce Commission.

Mr. SMITH of Michigan. Do you mean the shipper?

Mr. CUMMINS. I do.

Mr. SMITH of Michigan. I do not. In fact, I intend to strengthen that provision. * * *

I asked the Senator from Iowa yesterday whether the provision which gave the shipper his status was affected by these amendments, and he said it was not.

Mr. CUMMINS. I said it was not affected by my amendment, but it is affected by the amendment of the Senator from Michigan.

Mr. SMITH of Michigan. Yes; I think it is very greatly strengthened.

Mr. CUMMINS. Very well.

Mr. SMITH of Michigan. And that it gives the shipper rights that perhaps before might have been confusing and subordinate to the wishes of the Attorney General. I seek to avoid that.

Mr. CUMMINS. I simply wanted to know whether it is the Senator's purpose to strike out that part.

Mr. SMITH of Michigan. It is not.

Mr. CUMMINS. I simply call his attention, then, to the fact that he does do it, because that was made a part of section 5 by the action of the Senate at a former time.

Mr. SMITH of Michigan. The amendment I propose not only gives the shipper his status, but permits him, by his own counsel, to go to the conclusion of the litigation.

Thereafter Senator Smith further modified his amendment by inserting language now in the first proviso giving the Commission and parties in interest the right to appear in suits "of their own motion and as of right." *This modification resulted from a suggestion of Senator Borah because of his doubt that the Commission could show any such interest in a suit*

as courts of equity regard as essential to authorize intervention and that a provision should be made to overcome that and also that the Commission's appearance, as well as that of the parties in interest should not be subject to the control of the court. (Cong. Rec. Vol. 45, Part 6, p. 6451.) As thus modified and perfected the amendment was adopted (p. 6462).

From this legislative history it will be seen that this legislation was greatly altered from its original form. The strong opposition to the terms and provisions of section 5 resulted in the numerous amendments which have been adverted to. The provision authorizing the Commission to appear as a party as of right was a compromise between those who desired to commit to the Attorney General exclusive charge of the litigation on behalf of the Government and those who wished to have the Commission *alone* and not the Attorney General charged with defense of such suits. So as a result of the compromise both the Attorney General and the Commission were admitted to participation.

Cases like *Hamilton Trust Co.* v. *Cornucopia Co.*, 223 Fed. 494, 499, cited by appellee, holding that in order to appeal a party must have a *pecuniary* interest that is direct and substantial, do not preclude the appellants in this suit from prosecuting their appeal, in view of the special statutory provisions above referred to. Compare *State* v. *Railroad Commission*, 110 Pac. 1075 (60 Wash. 218).

Chicago v. *Chicago Rapid Transit Co.*, 284 U. S. 577, relied upon by appellee, is clearly inapposite; for in neither that case, nor in any of the cases cited in the

per curiam decision therein, was the right of the *regulating commission* to appeal, and defend its orders in the appellate court, denied. In that case the order in question was made by the Illinois Commerce Commission. Neither that commission nor the Attorney General of the State appealed from the decree of the three-judge District Court restraining enforcement of the commission's order and there was no holding by this Court that the commission lacked the right to prosecute an appeal. Compare *Chicago Junction Case*, 264 U. S. 258,268.

The Interstate Commerce Act in terms gives the Commission power to require extensions of interstate railroad lines. This provision has been invoked in a number of cases in the past and undoubtedly will be invoked in future cases. As long as the provision remains in the statute the Commission must take jurisdiction, hear, and decide the case. If it refused to do so, mandamus would lie. *I. C. C.* v. *Los Angeles*, 280 U. S. 52; *Louisville Cement Co.* v. *I. C. C.*, 246 U. S. 638. The importance of preserving the Commission's right to take an independent appeal to this Court to secure a final determination of the important questions involved in determining the validity of its orders is thus apparent.

On the merits

I

Section 1 (21) of the Interstate Commerce Act, in unambiguous terms, empowers the Commission to issue an order requiring any interstate common carrier by railroad to extend its line or lines, subject to the two limitations there specified

Section 1 (21) of the Interstate Commerce Act, in language that seems free from ambiguity, provides that the Commission may authorize or require by order any carrier by railroad subject to the Act to to extend its line or lines, subject to the two limitations or conditions specified. The paragraph is here reproduced in full for convenient reference:

> The Commission may, after hearing, in a proceeding upon complaint or upon its own initiative without complaint, authorize or require by order any carrier by railroad subject to this Act, party to such proceeding, to provide itself with safe and adequate facilities for performing as a common carrier its car service as that term is used in this Act, and to extend its line or lines: *Provided*, That no such authorization or order shall be made unless the Commission finds, as to such extension, that it is reasonably required in the interest of public convenience and necessity, or as to such extension or facilities that the expense involved therein will not impair the ability of the carrier to perform its duty to the public. Any carrier subject to this Act which refuses or neglects to comply with any order of the Commission made in pursuance of this paragraph shall be liable to a penalty of $100 for each day during which said

refusal or neglect continues, which shall accrue to the United States and may be recovered in a civil action brought by the United States.

The paragraph confers jurisdiction upon the Commission in reference to two distinct matters—car-service facilities and extensions of lines. It authorizes the Commission, first, to issue an order, after hearing, authorizing or requiring any carrier by railroad subject to the Act to provide itself with safe and adequate facilities for performing as a common carrier its car service as that term is used in the act;[11] second, to issue an order, after hearing, authorizing or requiring any carrier by railroad subject to the Act, to extend its line or lines.

The provision relating to extensions of lines is subject to both limitations prescribed in the pro-proviso, namely, (1) that no such authorization or order shall be made unless the Commission finds that the extension is reasonably required in the interest

[11] The term "car service" is defined in section 1 (10) as including "the use, control, supply, movement, distribution, exchange, interchange, and return of locomotives, cars, and other vehicles used in the transportation of property, including special types of equipment, and the supply of trains, by any carrier by railroad subject to this Act."

Under section 1 (21), therefore, the Commission now has authority to require a carrier to construct, buy, or otherwise procure locomotives, cars, and other vehicles including special types of equipment such as tank cars, refrigerator cars, and the like. Prior to the addition of this provision of section 1 (21) made by Transportation Act, 1920, the Commission did not have this power. *United States* v. *Penna. R. R. Co.*, 242 U. S. 208. (*Tank Car case.*)

of public convenience and necessity; (2) that the expense involved therein will not impair the ability of the carrier to perform its duty to the public. The provision relating to car service facilities is subject only to the second limitation. The expense involved in building an extension to a railroad or in constructing, buying, or otherwise procuring locomotives, cars, or other vehicles used in the transportation of property, including special types of equipment, is necessarily large, hence the limitation preventing the Commission from either authorizing or requiring a carrier to construct an extension or to provide itself with safe and adequate car service facilities where the expense involved will impair the carrier's ability to perform its public duty.

The Commission was called upon to interpret the provisions of Section 1 (21) in a case brought shortly after the passage of the Transportation Act and decided February 11, 1922, *Cooke* v. *C., B. & Q. R. R. Co.*, 66 I. C. C. 452. Complaint was filed by an individual acting for himself and other residents of Holt and Wheeler Counties, Nebr., praying that the Commission issue an order, under the provisions of this section, requiring defendant to extend its line of railroad from Ericson, Nebr., to Chambers, Nebr., 32 miles. The Commission said that the pertinent portion of Section 1 is as follows:

> The Commission may, after hearing, in a proceeding upon complaint * * * require by order any carrier by railroad subject to this Act, party to such proceeding, * * * to

> extend its line or lines: *Provided*, That no such * * * order shall be made unless the Commission finds, as to such extension, that it is reasonably required in the interest of public convenience and necessity, or as to such extension * * * that the expense involved therein will not impair the ability of the carrier to perform its duty to the public.

After observing that "the two conditions precedent, enumerated in the proviso of this paragraph, are closely associated," the Commission said:

> An order requiring a carrier to extend its line in the interest of public convenience and necessity, and involving as a necessary incident expenses which would impair the ability of the carrier to perform its duty to the public would be a contradiction. On the other hand, even though such proposed extension would not impair the ability of a carrier to perform its duty to the public, no order could be issued against a carrier requiring an extension of its line, unless such extension was reasonably required in the interest of public convenience and necessity. Both of the conditions must be satisfied precedent to the issuance of an order.

The Commission's conclusion was that "the issuance of the order prayed for would require defendant to invest a large sum of money in an undertaking which at the outset would not be a financial success, and would not hold out hope for the future." Its ultimate finding was that the proposed extension "is

not reasonably required in the interest of public convenience and necessity."

The next case to come before the Commission under paragraph 21 of Section 1 was *Gunderson* v. *C., M. & St. P. Ry. Co.*, 91 I. C. C. 702, decided July 12, 1924. The complainant, for himself and in behalf of numerous other residents of two counties in South Dakota, alleged that a 19-mile extension of the Milwaukee was reasonably required in the interest of public convenience and necessity and prayed that defendant be required to construct and operate such an extension. After quoting the two conditions contained in the proviso of paragraph 21 the Commission said that both conditions must be satisfied precedent to the issuance of such an order. "The first condition contains the second, and of necessity an order could not be made under the second condition unless the first is also satisfied." The Commission found "that the proposed extension would not at the outset earn a fair return on the investment, that the prospects for the future would be highly uncertain," and that the proposed extension "is not reasonably required in the interest of public convenience and necessity."

In *Clarkston Chamber of Commerce* v. *Northern Pac. Ry. Co.*, 160 I. C. C. 752, decided one month after the decision by the Commission in the case here in suit, the Commission found that "considering the public need for the proposed extensions as shown by the record, we would not be justified in requiring the carriers to construct any of the proposed extensions." The complaint there sought the construc-

tion of an extension from the terminus of the Homestead, Oregon, branch of the O.-W. R. & N. down the Snake River to Lewiston, Idaho, and an extension of the Northern Pacific from Lewiston, Idaho, to Clarkston, Wash. There the Commission adhered to its interpretation of Section 1 (21) as given in its report in the case at bar, citing its earlier decisions in the *Gunderson* and *Cooke cases, supra,* also *Construction of Lines in Eastern Oregon,* 111 I. C. C. 3, and *Los Angeles Passenger Terminal Cases,* 142 I. C. C. 489.

The Commission's latest decision under Section 1 (21) is *Public Service Commission of Wyoming* v. *Chicago, B. & Q. R. R. Co.,* 185 I. C. C. 741, decided July 6, 1932, in which it was asked to require defendants to construct and operate, as extensions of their existing lines, a connecting line or cut-off between Bonneville and Shoshoni, Wyo., 2.5 miles, and a branch line of railroad from a convenient point on one or the other of the defendants' lines to Pavillion, about 30 miles. The Commission found that the extensions were "not shown to be required in the interest of public convenience and necessity." Defendants contended that if the provisions of the Interstate Commerce Act invoked by the complainant be construed and applied in such wise as to empower the Commission to require the proposed construction, then such provisions are in contravention of the Fifth Amendment to the Constitution and therefore void.

The Commission, referring to the opinion of the court below in the case here in suit, said:

> As construed by the court, the constitutionality of the provisions of Section 1 (21) has been sustained.

It is worthy of note that although the Commission has been requested repeatedly to exercise the power conferred by Section 1 (21), the case at bar is the only case in which it has found that the facts justified the exercise of the authority.

In passing upon the above cases the Commission encountered no difficulty in understanding the meaning of the words in Section 1 (21). It gave effect to the natural import of the language. Likewise this Court has read the language according to its natural import.

In its first decision in Los Angeles Union Station case, *Railroad Commission of California* v. *Southern Pacific Co.*, 264 U. S. 331, the Court declined to sustain the validity of the order of the State Commission requiring the construction of the Union Depot on the ground that the expense involved might impair the ability of the carriers to perform their duty to the public, and that therefore a finding by the Interstate Commerce Commission as to whether the expense would so impair their ability was necessary as a condition precedent to any order of the State Commission requiring the construction of the

station.[12] The Court applied by analogy to that situation the proviso in Section 1 (21) relating to constructions of extensions, and, referring to that proviso, said:

> It forbids the Commission to authorize or order the extension of its lines "unless the Commission finds, as to such extension, that it is reasonably required in the interest of public convenience and necessity, or as to such extension * * * that the expense involved therein will not impair the ability of the carrier to perform its duty to the public."

In *Alabama Ry.* v. *Jackson Ry.*, 271 U. S. 244, holding that jurisdiction to require the construction of physical connections between main lines of intersecting interstate carriers has been vested exclusively in the Interstate Commerce Commission, the Court observed that by paragraphs 18–20 there was "vested in the Commission power to authorize constructions or extensions of lines, although the railroad is located wholly within one state," and that Congress

> by paragraph 21 authorized the Commission to require the carrier "to extend its line or lines."

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[12] The I. C. C. later made this finding and issued the necessary certificates under paragraphs 18–20 and the subsequent order of the State Commission was sustained, *Atchison Ry.* v. *Railroad Commission*, 283 U. S. 380. Before that the I. C. C. had held that it was without jurisdiction to order the construction of the station, and this holding was sustained in mandamus proceedings, *Interstate Commerce Commission* v. *U. S. ex rel. Los Angeles*, 280 U. S. 52.

Thus the language of paragraph 21 seems clear and unambiguous even when considered standing alone. The plain import of its terms is confirmed when it is read with the accompanying paragraphs relating to construction, extension, or abandonment of lines—paragraphs 18, 19, 20, and 22. Paragraphs 18–20 prohibit the construction, abandonment, or extension of lines, or acquisition or operation of any line or extension thereof, unless there shall first have been obtained from the Commission a certificate that the present or future public convenience and necessity require the construction or operation, or construction and operation, of such additional or extended line of railroad, or permit of such abandonment.

These paragraphs confer upon the Commission a negative or restraining power, preventing voluntary action by carriers in the construction of new lines or the abandonment or extension of old lines except where such action is found by the Commission to be in the interest of public convenience and necessity. *Colorado* v. *United States*, 271 U. S. 153; *Texas & Pac. Ry. Co.* v. *Gulf, Colorado & Santa Fe Ry. Co.*, 270 U. S. 266; *Chesapeake & Ohio Ry.* v. *United States*, 283 U. S. 35; *Transit Commission* v. *United States*, 284 U. S. 360.

Paragraph 21 contemplates construction of extensions of existing lines of railroad, demanded by public convenience and necessity, which the carriers are unwilling to construct voluntarily, and confers affirmative power upon the Commission, when it finds the

conditions of the paragraph satisfied, to require such extensions.

Paragraph 22 restricts the power conferred by paragraphs 18–21 so as not to extend—

> to the construction or abandonment of spur, industrial, team, switching, or side tracks, located or to be located wholly within one State, or of street, suburban, or interurban electric railways, which are not operated as a part of parts of a general steam railroad system of transportation.

Thus paragraph 22 makes it clear that the authority of the Commission over voluntary constructions, conferred by paragraphs 18–20, and over compulsory extensions, conferred by paragraph 21, applies to extensions which are more than merely spur, industrial, team, switching, or side tracks.

This construction is confirmed by the decision in *R. R. Comm.* v. *Southern Pac. Co.*, 264 U. S. 231, *supra*, in which Chief Justice Taft said:

> It is argued that paragraphs 18 to 21, of section 402, refer only to extensions of a line of railroad having the purpose to include new territory to be served by the interstate carrier and do not refer to an extension of new main track for the mere purpose of rearranging terminals within the same city. We do not think the language of paragraphs 18 to 21 can be properly so limited. We are confirmed in this by paragraph number twenty-two which immediately follows:
>
> "The authority of the Commission conferred by paragraphs (18) to (21), both in-

> clusive, shall not extend to the construction or abandonment of spur, industrial, team, switching or side trakcs, located or to be located wholly within one State, or of street, suburban, or interurban electric railways, which are not operated as a part or parts of a general steam railroad system of transportation."

Another provision of the Act authorizing the Commission to require extensions is worthy of notice for comparative purposes—section 6 (13) conferring additional jurisdiction upon the Commission over rail and water traffic. It provides in subparagraph (a) that the Commission shall have jurisdiction to establish physical connection between the line of the rail carrier and the dock at which interchange of passengers or property is to be made by directing the rail carrier to make suitable connection between its line and a track or tracks which have been constructed from the dock to the limits of the railroad right of way, and also by directing either or both the rail and water carrier, individually or in connection with one another—

> to construct and connect with the lines of the rail carrier a track or tracks to the dock.

The authority conferred by the paragraph is subject to the proviso—

> That construction required by the Commission under the provision of this paragraph shall be subject to the same restrictions as to findings of public convenience and necessity

and other matters as is construction required under section 1 of this Act.

The provisions of paragraphs 18–22 of section 1 and paragraph 13 of section 6 are not to be confused with the power conferred by paragraph 9 of section 1 authorizing the Commission to require by order the construction, installation, and operation of switch connections. Cf. *C., C., C. & St. L. Ry. Co.* v. *United States*, 275 U. S. 404; *United States* v. *N. Y. Cent. R. R.*, 272 U. S. 457.

When the provisions of paragraphs 9, 18–20, 21, and 22 of section 1 and paragraph 13 of section 6 are read together, the meaning of paragraph 21 of section 1 becomes clearer, if possible; and it seems obvious that the extensions mentioned in that paragraph refer to extensions which are more than switch connections or short spur or connecting tracks. They seem to cover such extensions as the Commission has authorized in many cases, under pars. 18–20. Cf. *Construction of Extension by Oregon-Washington Railroad & Navigation Co.*, 86 I. C. C. 264, authorizing construction of a 30-mile extension of the Ontario-Crane branch to Burns, Oreg.; *Construction of Line by O. S. L.*, 82 I. C. C. 40, authorizing construction of an extension from Rogerson, Idaho, to Wells, Nev., 97.7 miles (this extension is commonly known as the Rogerson-Wells Cut-off); *Construction of Natron Cut-off by C. P. Ry. Co.*, 82 I. C. C. 185, the extension from Oakridge to Kirk, Oreg., 118 miles; *Construction of Line by North & South Ry.*, 86 I. C. C. 663, authorizing an extension from Miles City, Mont., to Casper,

Wyo., 332 miles. There are innumerable other similar cases.

The court below expressed doubt as to "how far a line or lines may be extended within the purview of the extension provisions of the act." It quoted from *Lancaster* v. *Gulf C. & S. F. Ry. Co.*, 298 F. 488, 490, as follows:

> The terms "extension of line of railroad" and "industrial track" have no clear and established restrictive definition, either in dictionaries or in railroad practice, which will permit of the case being settled by rule of thumb, but, on the contrary, these terms have a wide latitude of meaning, according to the context in which they are used. Since Congress has not undertaken to define the words used, and since it is plain that they may be, according to the angle of approach, given wide and varied meaning, it is evident that the purpose of the act must be drawn from its entire structure, and that purpose, together with the context in which the words are used, must at the last be the guide to the interpretation of the words at issue. (R. 160.)

It would seem that the question of the length of the extension, standing alone, is not important. A relatively long extension in the open country might not cost as much to construct as a very short one in a congested metropolitan area where property values are high. It would obviously have been impracticable for Congress to attempt to prescribe legislatively the definite maximum mileage of an extension which the Commission might require. No

such limitation was needed, for the conditions that were prescribed operate as definite limitations. The extension must be "reasonably required in the interest of public convenience and necessity." This is to be determined by the Commission in the exercise of its administrative judgment, comparable to that involved in a determination of the propriety or application of a rate, rule or practice. *Tex. & Pac. Ry. Co.* v. *G. C. & S. F. Ry. Co.*, 270 U. S. 266, 273. The Commission's judgment upon the question of public interest is to be formed only after hearing and this implies "both the privilege of introducing evidence and the duty of deciding in accordance with it." *Chicago Junction Case*, 264 U. S. 258, 265.

The prohibition against requiring an extension the expense of which would impair the carrier's ability to perform its duty to the public also operates as a real limitation, especially when full effect is given to the significance of the word "impair"—the ability of the railroad to perform its common carrier duties must in no degree be weakened or worsened.

It may be noted that the Union Pacific system operates a total mileage of 15,045.17 (9,676.81 miles of road; 1,526.31 miles of additional main track; 3,842.05 miles of yard tracks and sidings, Ex. No. 40, page 5, 1927 annual report.) The 185-mile extension ordered would increase the total mileage about 1.2 per cent and the miles of road about 1.9 per cent. The total investment in road and equipment of the system at the end of the calendar year 1927 was $848,049,622.95 (Ex. No. 40, page 16). The additional investment

required for the extension ordered, to use the carrier's estimate of $11,717,677 for construction and equipment, would increase the system's total investment in road and equipment by about 1.4 per cent.

II

An interpretation of the compulsory extension provision broad enough to embrace such an extension as here ordered is in strict conformity with the Commission's recommendation for enactment of the provision and does not give the provision a larger import in the law than it had in the recommendation

In December, 1918, when the Commission submitted its annual report to Congress, the end of the period of Federal control was approaching, and the question of the future policy with respect to the railroads was still an open one. The Commission said:

> That emergency is passing, and in the light of experience gained and to be gained therefrom it will be profitable to appraise the results of unified operation and to apply them, in so far as pertinent, to the solution of the problems expressly reserved by the Congress for later consideration. The conditions, without precedent or parallel, which the war has produced now press upon the Congress matters of the gravest national and international concern.

The Commission indicated certain lines of inquiry necessary to be pursued in order to reach sound conclusions, forecasting that various plans would doubtless be proposed, such as continuance of the plan of Federal control, public ownership of carrier property with private operation under regulation, private operation under regulation with governmental guaran-

tee, public ownership and operation, resumption of private control and management under regulation. (Ibid., 2–3.)

"Whatever line of policy is determined upon," the Commission said, "*the fundamental aim or purpose should be to secure transportation systems that will be adequate for the Nation's needs*, even in time of national stress or peril *and that will furnish to the public safe, adequate, and efficient transportation* at the lowest cost consistent with that service."

To this end the Commission made four major recommendations, as follows:

> (1) the prompt merger without friction of all the carriers' lines, facilities, and organizations into a continental and unified system in time of stress or emergency;
>
> (2) merger within proper limits of the carriers' lines and facilities in such part and to such extent as may be necessary in the general public interest to meet the reasonable demands of our domestic and foreign commerce;
>
> (3) limitation of railway construction to the necessities and convenience of the Government and of the public, *and assuring construction* to the point of these limitations;
>
> (4) development and encouragement of inland waterways and coordination of rail and water transportation systems.

Shortly after the armistice, as stated in the Commission's 1919 annual report, the Senate Committee on Interstate Commerce requested the Commission to designate one of its members to present at the

committee hearings "available data and other information bearing on the railroad situation in the country." Commissioner Clark, the senior member of the Commission and chairman of its legislative committee, was designated as such representative, and he was authorized to present to the Senate committee a written statement embodying the prevailing views of the members of the Commission with reference to the subjects therein discussed and outlining generally the legislative program to which as a body the Commission gave its support. This statement which is quoted in full in the 1919 report, pages 1–9, discusses the four major recommendations, and in respect of the third, relating to railway construction, explains separately the thought underlying the first and second parts of it, the first part being "limitation of railway construction to the necessities and convenience of the government and of the public," and the second part, "and assuring construction to the point of these limitations."

In respect of the first part the statement said:

> The thought underlying the first part of this suggestion is that in some instances, for speculative or competitive reasons, railroads have been built in excess of the reasonable demand and in excess of the necessities of the territory built into, as well as of its reasonably prospective traffic. A railroad once built ordinarily must be operated and permitted to earn a living. The public should not be burdened with the maintenance of two or more railroads when one would substantially an-

> swer every legitimate purpose. In this connection it would be desirable that in the exercise of its powers the Congress should say that no railroad shall be constructed or extended that is to engage or is engaged in interstate commerce unless, in addition to required authority from the State, a certificate of public convenience and necessity is secured from Federal authority.

Responsive to that part of the recommendation, Congress enacted pars. 18–20 of section 1 requiring certificates of public convenience and necessity by the Commission as a condition precedent to voluntary constructions or extensions of railroads.

The discussion of the second part of the recommendation—"and assuring construction to the point of these limitations"—responsive to which par. 21 of section 1 was enacted in so far as it confers jurisdiction upon the Commission to require construction of extensions, reads as follows:

> The thought underlying the second part of this suggestion is that a railroad having been permitted, by public franchise and the powers that go with it, to build into a given territory, it should be required to properly serve and develop that territory. And in developed territory it is important to provide for the extension of short branch or spur lines or spur tracks to communities and industries that should be served and that can furnish sufficient traffic to justify such extension.
>
> In some of the States the State officers are authorized to require such extensions, but in

such cases they are necessarily primarily concerned with, if not confined to, a consideration of State traffic. Some of the States have not vested such authority in any State official. Ordinarily such extensions would be desired for the purpose of facilitating or making possible the transportation of interstate traffic. The desirability of uniformity is obvious. The exercise of Federal authority should not depend upon whether or not the State has acted and should not be different as to the State that has legislated on the subject and the State that has not so legislated.

It therefore seems desirable that the Congress should exercise its jurisdiction in this regard in a plenary way and that where such extensions are desired in connection with the movement of presently existing or prospective interstate traffic and the carrier is unwilling to construct them, it may, upon proper showing and after full hearing, be required to do so by the Federal tribunal.

It will be noted that the thought underlying the second part of the recommendation contemplated compulsory extensions in both developed and undeveloped territory. In respect of developed territory, the predominant thought was the importance of providing for the extension of short branch or spur lines or spur tracks to communities and industries that could furnish sufficient traffic to justify such extensions, whereas in respect of undeveloped territory the thought was that a railroad that had been permitted to build into a given territory should be required to properly serve and develop that territory.

The O.-W. R. & N. has been permitted by public franchise and the powers that go with it to build into the general territory of central Oregon. Its present Ontario-Burns branch projects in a general westerly direction toward the interior of Oregon. Beyond that the territory must be classed as undeveloped in the sense that it is without adequate railroad service, although the record shows that it is capable of substantial development if an outlet to available markets is provided. It is significant to note in this connection that for years this carrier held a public franchise to build the very extension that is required by the order here in question. (See Ex. A, R. 1897, par. 18, R. 1901, and Ex. B, R. 1904–1905.)

Commissioner Clark, in testifying before the House Committee on Interstate Commerce, invited comparison of the bill with the Commission's recommendations, and referring particularly to the third major recommendation, said:

> This is provided for on page 9, beginning in line 4, a new provision, which prohibits the construction or the abandonment of lines of railroad except upon authority of the regulating tribunal. On page 11, line 11, there is authority for the Commission to require a carrier to extend its line or lines, thus insuring construction to the point of these limitations.[13]

It will thus be seen that the provision under which a railroad may be required to extend its line in order

[13] Page 53, hearings before Committee on Interstate and Foreign Commerce, House of Representatives, 66th Cong., 1st sess., on H. R. 4378, Vol. 1.

"to properly serve and develop" the territory into which it has been permitted to build, was enacted in pursuance of the four major recommendations of the Commission, the fundamental purpose of which was to secure adequate national transportation service. (Many of the other provisions of Transportation Act, 1920, having that object in view were included among the various recommendations. See 1918 and 1919 Annual Reports.)

The opinion of the court below, after quoting the Commission's statement of the thought underlying the second part of the recommendation to Congress, *supra*, said that "if such was the purpose of the amendment it should be so limited by the courts" (R. 160), citing *United States* v. *Penna. R. R. Co.*, 242 U. S. 208, 227. But it seems obvious that the amendment here in question is not sought to be given larger import than it had in the recommendation, but on the contrary, it is sought to be applied in strict conformity with and to carry out the purpose of the recommendation.

III

The facts developed in the exhaustive record before the Commission demonstrate the public convenience and necessity for the extension, and fully justify the order requiring its construction

It is impracticable within the limits of a reasonably sized brief to review the voluminous facts established by the exhaustive evidence of record and considered by the Commission in reaching its conclusion that public convenience and necessity

require the building of the extension in question.[14] Indeed, such a review seems unnecessary, in view of the finding of the court below that the Commission's findings are supported by substantial evidence (R. 157) and the holding of this Court in the Los Angeles union passenger station case, *Atchison Ry.* v. *Railroad Comm.*, 283 U. S. 380, in which the Court said:

> The questions presented are solely those of constitutional authority. All questions of fact as to public convenience and necessity, and as to the practicability of the proposed plan, have been resolved against the Railway Companies by the proper tribunals. [The State Commission and the Interstate Commerce Commission.] (*Ibid.*, 390, 391.)

In *Ches. & Ohio Ry.* v. *United States*, 283 U. S. 35, referring to the extension provisions of section 1 (18) of the Interstate Commerce Act, the Court said:

> There is no specification of the considerations by which the Commission is to be governed in determining whether the public convenience and necessity require the proposed construction. Under the Act it was the duty of the Commission to find the facts and, in the exercise of a reasonable judgment, to determine that question. *Texas & Pac. Ry. Co.* v. *Gulf, C. & S. F. Ry.*, 270 U. S. 266, 273.

[14] The two reports of the Commission, which do not purport to state the details but only the ultimately established facts, cover 93 printed pages, 56 in the first report, 111 I. C. C. 3–58, and 37 in the second report, 159 I. C. C. 630–667.

In the case cited the Court said:

> The function confided in the Commission is comparable to that involved in a determination of the propriety or application of a rate, rule, or practice. It is the exercise of administrative judgment.

Hence, the rule that if the determination of the Commission finds substantial support in the evidence, the courts will not weigh the evidence, is applicable here. *Assigned Car Cases*, 274 U. S. 564, 580; *Chicago, R. I. & P. R. Co.* v. *United States*, 274 U. S. 29, 33; *Virginian Ry.* v. *United States*, 272 U. S. 658, 665; *New England Divisions Case*, 261 U. S. 184, 204; *Warehouse Co.* v. *United States*, 283 U. S. 501, 508.

It seems sufficient, therefore, to refer briefly to some of the important public advantages to be attained by the construction of the extension.

1. It will aid in more adequately serving and developing a large area in eastern and central Oregon that is now either wholly unserved or inadequately served by existing railroad lines

The map on page 633 of the Commission's report (R. 54) shows the vast area within the State that is without rail facilities. The Commission said, "The area probably constitutes the largest area within the United States which is without rail facilities." (R. 53.)

It was urged in behalf of the State of Oregon that its development, as compared with other States, "has been held back and seriously hampered, due to the lack of direct routes to the markets for her

products, and that the construction of the proposed extension is an important part of anticipated development of adequate rail transportation facilities within the State." (R. 55.)

"*The evidence of complainant and defendant brings out clearly and forcibly that no section can develop without transportation,*" the Commission said; and further:

> The major portion of the State of Oregon is without adequate transportation facilities and this is particularly true with respect to the portion which would be served by the proposed construction." (R. 55–56.)

The basic resources of the territory which would be affected by the proposed line, the Commission said, "are lumber, grain, livestock, farm products, dairy products, and fruits. This statement includes the western portion of Oregon and southwestern Idaho as well as the territory along the extension." (R. 58.)

The particular area through which the extension would run is described in the report as follows:

> Proceeding west from Crane somewhat swampy areas are encountered for a distance of approximately 20 miles in the vicinity of Malheur Lake. The area included in the next 15 miles is referred to as alkali flats where the topsoil has been blown into sand ridges. A limited area west of this portion contains considerable grassland and some land capable of reclamation and cultivation. The succeeding area for a distance estimated from 75 to 115 miles is a rolling country with an altitude varying from 3,500 feet to approximately

> 4,500 feet. This area approaches the foothills of the Cascades and the timbered area of the Paulina [Paunina] National Forest through which the extension would pass for the remaining portion of the distance to Crescent Lake.
>
> The area along the proposed line is sparsely settled. It is said that when the original survey was made through this section prior to 1912 many homesteads were taken up but these were largely abandoned after it was determined that the line would not be built.
>
> There is some difference of opinion as to the nature of the soil in several portions of the area which would be tributary to the proposed line. The annual rainfall in the area to be traversed by the line is less than 14 inches. With the exception of mountainous areas the snowfall is not very great in this territory. (R. 57.)

In his dissenting opinion in the first report Commissioner McManamy said:

> The so-called 75-mile stretch of semiarid territory in the central part of the State is stressed as one of the chief difficulties in the way of the construction of the cross-State line although it is admitted that the construction work would not be unusually heavy. If that were an insurmountable obstacle, which transcontinental line would have ever been built? Each one of them has crossed from four to ten times that distance of semiarid or arid country, some of which has since developed into the most profitable territory served by

> the line. No more arid country ever existed on earth than the Imperial Valley in southern California, but since transportation has been provided it is one of the most profitable sections served by the Southern Pacific. The same is true of sections in the State of Washington; therefore why should that be stressed as a reason for not giving the admittedly fertile sections of the State of Oregon necessary transportation facilities to permit them to develop in a normal and proper way? (R. 1893.)

"The history of railway construction," the Commission said in *Construction of Line by Wenatchee Southern Ry. Co.*, 90 I. C. C. 237, 256, "illustrates that *prospective* tonnage depending for its development upon transportation facilities, rather than tonnage immediately in view, has been the main justification for railway construction."

Large sums of money have been spent in irrigation projects in this area, by the Federal government, the State government, and private interests (see Commission's report, p. 638, under the heading "Irrigation Projects," R. 58), but, as stated in the earlier report, "it is, of course, not feasible to develop a source of irrigation water and to apply it to the reclamation of land at heavy expense, unless markets for the crops raised can be assured within practicable reach of the producer." (R. 1862.)

The following brief description of the territory involved is given in the earlier report:

> * * * The territory equals the combined areas of Massachusetts, Connecticut, New Jersey, and Delaware. It is a plateau, more or less broken, at elevations that range between 4,100 and 4,700 feet above sea level, with certain mountain ranges and peaks much higher. It is bounded on the east by the Blue, Cedar, and Stein's Mountains, and on the west by the Cascade Mountains. At the north it slopes steeply to elevations of between 100 and 300 feet at the Columbia River, and at the south extends into Nevada and California.
>
> In the north, on the Blue Mountains and west, are large stands of western yellow-pine timber, chiefly in forest reserves. In the center is a semiarid region, roughly 75 miles each way, of waste land incapable of developing any substantial traffic, except the chemical deposits of certain lakes. East and south of this waste area are productive districts and valleys, long noted for their production of livestock. In the west, on the eastern slope of the Cascade Mountains, across the entire State, are vast stands of timber, chiefly yellow pine, and a number of agricultural areas capable of extensive development. (Rep. 14–15; R. 1854–5.)

The nature of the territory, its products and its handicaps because of the absence of railroads are described as follows in first report:

> The difference in general climatic conditions and in altitude makes the sections of Oregon

east and west of the Cascade Mountains entirely unlike in character, especially as the country recedes from the mountain range. These conditions have profoundly influenced the population and economy of eastern Oregon. As we might expect in a semiarid country at high elevation, we find livestock raising a predominating industry, with agriculture limited by the supply of water, and therefore ranging from the sparse and hardy grains of the dry-land farmer to the profuse and diversified products of the irrigationist in the favored valley. These conditions prevail throughout much of the territory here considered. There can be no large cities in such territory, under usual circumstances, especially in the absence of adequate transportation. Bend, with a population of 8,000, which has chiefly come to it with the lumber industry, is the largest municipality in the territory under consideration. Access to large markets where livestock, or the bulky low-grade or specialty agricultural products, can be transported at favorable transportation costs, is the life of the community.

The counties are large and the distances great. There is much rough land, which, however, finds its use in large part as pasturage and grazing ground for livestock. To counterbalance this wastage, the valleys are often of considerable extent, and of extraordinary fertility. There is more water available for irrigation that has yet been utilized, although the area of irrigated land has increased progressively. * * *

In eastern Oregon, with adjacent portions of the States of California, Nevada, and Idaho, we therefore find important sources of supply of livestock, more especially of cattle, sheep, and horses. Wool from this section is an important source of the Nation's supply, and finds its market on both coasts. The dairy industry has shown growth, limited in part by the availability of the markets in California and upon the north Pacific coast. Evidently the sugar-beet industry is capable of development. Potatoes and other vegetables from the large and highly developed irrigated sections of Idaho find ready market. Hay is produced in profusion, but its production must be limited by the use to be made of it locally, in the absence of railroad transportation to other capable consuming markets. Wheat and the coarse grains are produced in quantities varying with the soil and climatic conditions. Livestock goes long distances to the market on its own feet, but this is relatively expensive, and involves shrinkage in quantity and quality which is reflected in the price received. Herds of feeder cattle might be brought in by suitable rail transportation, which would consume locally grown products, and encourage development. At the risk of repetition, we may say it is clear that the principal markets for the present and prospective products of agriculture, including livestock, of the portions of the States mentioned, must be found in the much more densely settled western slope of the States of Oregon, Washington, and northern California, and markets reached

through the ports and gateways of the western slope.

The mineral resources are very limited. Extensive deposits of sodium carbonate are contained in Alkali Lake, 18 miles south of the proposed cross-State line, in the eastern part of Lake County. Much is said as to the inexhaustibility of the supply of this product, and its unequaled purity. The product is evidently of great value when markets can be reached with good transportation. Substantial financial interests stand ready to develop the project when transportation is assured. Silicate of soda is named as another product which could be produced in south-central Oregon in quantity. (Rep. 22–24, R. 1862–3.)

2. The construction of the extension would provide shorter routes which would make it possible to ship perishable commodities to available markets

"Traffic now originating in western Oregon and destined to eastern points must move either south to Roseville, Calif. [or Fernley, Nev.], or north to Portland, Oreg., before the eastward movement in reality begins. Similar movement is experienced on traffic originating in eastern Oregon and southwestern Idaho, destined to California points and to points in southwestern Oregon. *The resulting longer haul and greater time consumed renders it impossible to ship certain commodities of a perishable nature to what would be available markets if the shorter routes to be provided by the proposed extension were available.* Present routes which are termed unduly circuitous have similar effect on the marketing of agricultural products, livestock, and lumber." (Rep. 635, R. 55.)

3. Joining the lines of the Southern Pacific on the west with those of the Union Pacific on the east, the extension would afford a new, shorter, more expeditious, and more economical transcontinental route between western Oregon and the East

"While the Oregon Commission seeks additional mileage for areas now inadequately supplied with railroads, its governing motive," the Commission said in its earlier report, "was to remedy the present rail situation by which the products of western Oregon reach eastern markets only by movement to the northward and eastward over the lines of the Great Northern, Northern Pacific, or Chicago, Milwaukee & St. Paul, or by movement southward and eastward over the lines of the Southern Pacific and Union Pacific by way of Roseville, Calif., and Ogden, Utah, or the transcontinental lines still farther south." (Refs. 14 R. 1854.)

In contrast with four great transcontinental systems traversing the State of Washington from east to west, Oregon enjoys but one, the Portland line of the Union Pacific System. This line, following the south bank of the Columbia River, is in the extreme northern part of the state. The vast area of Oregon lying south of this line is wholly without the benefit of any railroad which forms part of a direct transcontinental route. The next transcontinental line encountered on the south is the San Francisco-Ogden line of the Southern Pacific, approximately 650 miles south of the Union Pacific-Portland line, a distance farther than from Washington, D. C., to Portland, Maine. As a result, all transcontinental traffic originating in western Oregon must travel many miles either

northerly or southerly before the movement towards the east actually begins.

The ordered extension, spanning the relatively short gap between the Ontario-Burns branch of the Union Pacific and the Cascade line of the Southern Pacific, would afford Oregon a second east-west transcontinental route, penetrate the vast unserved area of Oregon, and shorten the distance between the east and virtually every point in western Oregon by many miles.

In the past the great bulk of transcontinental traffic to and from western Oregon has been transported over the route through Roseville, Calif. The distance over that route from Granger, Wyo., to Eugene, Oreg., is 1,339 miles. Over the cross-state extension, that is, via the Oregon Short Line to Ontario, the Ontario-Burns branch to Crane, thence the cross-state extension to Crescent Lake, thence the Southern Pacific to Eugene, the distance from Granger to Eugene would be 913 miles, or 426 miles shorter than via the route through Roseville. Traffic originating on the Union Pacific or its connections at any point east of Granger and destined to Eugene, Oreg., would move through Granger whether it traveled over the route through Roseville, Calif., or over the route formed by the Crane-Crescent Lake extension. Hence, there would be the same difference in distance in favor of the Crane-Crescent Lake route whether the traffic originated at Granger or at any point east of Granger. (Ex. 109.)

The opening of the Alturas Cut-off has shortened the route between the East and western Oregon when the traffic moves over the Union Pacific to Ogden and then over the line of the Southern Pacific. Whereas the distance from Granger to Eugene, Oreg., via Roseville, is 1,339 miles, the distance via Fernley, Nev., and the Alturas Cut-off is 1,127 miles. But despite this shortened route, the route formed by the Crane-Crescent extension would be still shorter, for, as above stated, the distance from Granger to Eugene via that route is 913 miles, or 214 miles shorter than via the Alturas Cut-off. (Ex. 109.)

The newly constructed line of the Great Northern, crossing the State of Oregon in a north-south direction just east of the Cascades, greatly shortens the distance from the parts of Oregon they serve to points of destination on the northern lines and connections, but will not constitute a short route from western or central Oregon for traffic destined to points on the Union Pacific system and connections which serve a vast territory not reached directly by the northern lines.

4. The construction of the extension with the resulting shorter routes to Pacific Coast markets would be of great advantage to southwestern Idaho

Tributary to the Crane-Crescent extension on the east is the rich, irrigated area of southwestern Idaho, comprising ten counties. The investment in irrigation projects in this territory is approximately $27,584,676; the value of the farm property in the ten counties is $102,714,968, as of 1925, and this

covers 9,931 farms; the value of the livestock on these farms in 1925 was estimated to be $12,867,173, and the average of all crops per year is estimated to be $33,788,792. The principal crops in the ten counties are potatoes, corn, apples, wheat, oats, barley, alfalfa. (Rep. 652, R. 71.)

"This section looks principally to California for markets," the Commission stated (Rep. 651, R. 70) and it found that—

> The distance to San Francisco would be shortened approximately 400 miles as compared with present routes

by the construction of the extension across central Oregon (Rep. 649, R. 68). The opinions of witnesses for the Idaho Commission, which intervened in support of the Oregon Commission's petition, were that California constitutes the principal market for many Idaho products and that the Oregon cross-state line "would aid materially in getting their products to those markets in the shortest time and with less expense to the carriers and to the shippers due to shorter routes thereby made available." In this way it was hoped "not only to market more of present production but to increase materially the demand for Idaho products and thus make practical substantial increases in production." It was said that "at present the volume of production and variety of commodities is dependent largely upon ability to dispose of the products at the markets. The present originating territory for many commodities and products moving to California points

is considerably farther east than Idaho. The same commodities being produced in Idaho, and potential production being much greater than present production, it is urged that the volume of these products moving to California from Idaho could be greatly increased if shorter rail routes were provided." (Rep. 652–653, R. 71.)

Referring to the livestock industry of southwestern Idaho the Commission said:

> The principal markets now available for southwestern Idaho livestock are Portland and Seattle. Some shipments go to California but are limited due to heavy shrinkage losses and expense of feeding en route caused by time consumed over present routes. The demand for livestock at Portland is limited and the market is often oversupplied. The return from the sale of livestock depends upon the condition in which they arrive at the market and it stated that often stock classed as "fat" when shipped are, due to shrinkage, reduced to "feeder" upon arrival at market. The loss due to shrinkage and extra feeding is estimated from $65 to $68 per car of stock for each added 400 miles the shipment moves on the longer hauls. The markets at Los Angeles and San Francisco, especially the latter, must be looked to by southwestern Idaho producers. The shorter route over the proposed line would be of great value in making these markets available and bringing them within permissible shipping distance.
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> * * * * *

> Idaho is said to have abundant feeding territory, and it is expected that much traffic will be afforded the proposed line through the use of Idaho feeding territory for feeder cattle being moved toward the markets from neighboring sections. The proposed line would permit the fattening of stock in southwestern Idaho and then quick movement to the western markets. The proposed line would also afford to shippers means of diverting shipments either north or south when reaching the north and south lines in western Oregon so as to reach the best markets. (Rep. 653; R. 72.)

(For further data in reference to southwestern Idaho, see Commission's report, pages 649–654, R. 68–73.)

5. Quicker transportation and shorter routes, afforded by the extension, would be of much advantage in the transportation and marketing of the products of the Umpqua and Rogue River valleys

These valleys are located in southwestern Oregon south of the Willamette Valley. According to the Southern Pacific, the valley of the Rogue comprises an approximate area of 2,300 square miles, of which there are over 500 square miles of rich valley floor and gentle hill slope. The soil is ideal for strawberries and loganberries, but the valley is best known for its pears, apples, and peaches, particularly pears. The Umpqua Valley lies north of the Rogue. This is really a succession of small and fertile valleys, the soil of which is deep and sandy loam. There are about 3,000 square miles of land in the Umpqua Valley in which apples and pears are produced.

"Quicker transportation and shorter routes would be of much advantage in the transportation and marketing of the products of these valleys. A large part of the movement is under refrigeration and to eastern markets. The extension across central Oregon "would afford a shorter and more direct route from this territory to the east," the Commission found. (Rep. 645–646, R. 65.)

6. The construction of the extension would tend to aid the development of the Coos Bay territory

The harbor at Coos Bay is said to be the most improved port between Portland and San Francisco. Large sums have been spent by the Federal and State governments in its development. Coos Bay is served exclusively by a branch line of the Southern Pacific from Eugene.

Witnesses representing this territory expressed the hope that if the Union Pacific constructs the extension to Crescent Lake, it would through common user with the Southern Pacific, or its own construction, eventually extend its service west of the Cascade Mountains to Coos Bay, to the Rogue, Umpqua, and Willamette Valleys and adjacent territories. With this accomplished and with resulting competition and direct and shorter routes to and from the East, increased development is expected. The opinion was expressed that the territory and the port can not be developed until it is served by more than one railroad and by lines running in more than one direction. (Rep. 647, R. 66.)

Much of the acreage in Coos County and in Curry County (which adjoins Coos County on the south and is wholly without railroad facilities) is now devoted to producing hay and feeds for dairy cows. If means were provided by construction of the Crane-Crescent Lake extension for direct movement of these feeds from Central Oregon, which is capable of producing large quantities of hay and other feeds, into the Coos Bay country, the acreage therein now devoted to producing such feeds could be devoted to pasture and consequently many more dairy cows maintained and the production of dairy products greatly increased. (Rep. 647; R. 67.)

7. The extension would aid in preventing and relieving car shortages.

During many periods in the history of Oregon its industrial activity and development has been retarded by continually recurring severe car shortages. The commercial prosperity of the State is so dependent upon the marketing of its products that it quickly responds to any slackening in movement. The lack of effective rail competition accentuates this situation. Except for the Oregon Electric, the Southern Pacific is without railroad competition in all western Oregon south of Portland. (R. 1859–1860.) In its report the Commission found that—

> The construction of the proposed extension would greatly relieve car shortages by the avoidance of the long haul by present routes and by making available the supply of cars

of the Union Pacific System. (Rept. 648, R. 68.)[15]

8. The extension would aid the State of Oregon in marketing its vast stands of virgin timber, huge tracts of which are now deteriorating and going to waste because of the lack of adequate transportation facilities

Oregon contains 494 billion feet of standing merchantable timber, according to Government estimates. (R. 209.) This amounts to one-sixth of the standing timber of the United States. (Rep. 641, R. 61.) Both the entire eastern and western slopes of the Cascade Mountains, from the Columbia River to California, is virtually a solid body of virgin timber. On the eastern slope the timber is pine, on the western slope it is fir. The Coast Range of Mountains is also almost a solid belt of virgin fir timber. (R. 207–210.) In Coos County alone the standing timber ready to cut is estimated at 30 billion feet, with a somewhat less amount in Curry County. (Rep. 647, R. 67.) Coos County is served only by one branch line of the Southern Pacific; Curry County has no rail facilities whatever. East of the Cascades there are also large stands, aggregating 50 billion feet of pine timber. (Rep. 642, R. 61.) Of this, the principle tracts are in the Klamath Basin and in the territories tributary to Lakeview and Bend. (Rep. 642, R. 61.) In the original report it is stated:

[15] Further facts and figures in regard to the matter of car supply are given in the Commission's reports. See second report, page 648, R. 68; first report, pages 20–21, R. 1859–1861.

> Of the total in the State, 70 per cent, or 350,000,000,000 feet, is tributary to the Southern Pacific lines, 320,000,000,000 feet west of the Cascades and 30,000,000,000 feet in the Klamath Basin. A large proportion of this timber, enormous in its aggregate, is the property of the Nation. It is administered under conditions designed to secure the continuance of the supply steadily for generations. *The threatened diminution in the available supply of southern pine has resulted in increasing reliance being placed by the country upon the timber of the Pacific coast.* It is estimated that within 10 years 11,000,000,000 feet more per annum than is now produced will have to come from the Pacific coast. With 43 per cent of the stand, Oregon's share of the increase will be close to 5,000,000,000 feet. Thus the present output of 3,500,000,000 feet per year, or 140,000 carloads, may reasonably be increased to 8,500,000,000 feet, or 340,000 carloads. (R. 1863.)

That report further states that "A large proportion, estimated at 24 per cent for the State, *is mature and will deteriorate rapidly.* Much destruction is caused by forest fires." (R. 1864). Commenting upon this statement, Commissioner McManamy said in his dissenting opinion:

> I can not refrain * * * from quoting from the report the statement that the national forest reserves in eastern Oregon contain timber estimated at 47,000,000,000 feet and privately owned lands contain 29,510,000,000 feet, and that 24 per cent is mature

> and will deteriorate rapidly. This means that to-day there are approximately 17,000,000,000 feet of timber in eastern Oregon that is now mature and should be gotten out without delay and that not to exceed 50 per cent of it can be reached by logging roads from the present and proposed lines. In view of the rate at which our timber resources are being exhausted this situation deserves more consideration than has been given it. (R. 1892–1893.)

In its second report the Commission said that although the territory through which the proposed railway would run is not primarily a timbered country, still "there are very considerable stands of timber which could be opened up following the construction of this line." The Commission added, tersely but significantly:

> *This timber is mature and will deteriorate rapidly. Harvesting of timber without transportation is impossible.* (Rep. 641–642, R. 61.)

The report then points out the timber in Oregon that is tributary to the extension ordered, referring first to Harney County. While the timber in the northern part of that county is provided with transportation by the railway line to Burns, the report said, "the circuitous route which must be followed in order to reach a market, either in California or via water transportation from Portland, is sufficient to discourage development there. The construction of the proposed extension will shorten the route to the tidewater at Portland by 183 miles and also open the California market to the lumber manufactured in northern Harney County." (Rep. 642, R. 62.)

The Ochoco National Forest lies just north of the extension ordered. Immediately to the east of the Ochoco is the Malheur National Forest, while to the southwest is the Deschutes National Forest. (These forests are shown on the map, Ex. C to petition, R. 86, and that map also shows the counties.)

> The timber in the Ochoco National Forest as well as the privately owned timber in eastern and southeastern Crook County, southeastern Wheeler County, and southwestern Grant County, will be found tributary to the proposed line. (Rep. 642, R. 62.)
>
> The timber in the Deschutes National Forest as well as the privately owned timber in northern Klamath County while tributary in part to the Southern Pacific and the Great Northern will be served in part by the proposed railway line. (Rep. 642, R. 62.)

In the three national forests mentioned, the Malheur, the Ochoco, and the Deschutes, there are 8 billion feet of standing timber.

> This estimate applies only to national forest timber in that section of each county which appears to be tributary to the proposed railway line. There are large stands of privately owned timber in Crook, Wheeler, Grant, and Klamath Counties. That portion of the privately owned timber in these counties which is contiguous to the national forest timber which is tributary to the proposed extension will, of course, be trib-

> utary to that line. No estimates of the stands of privately owned timber are available. (Rep. 642–643, R. 62–63.)

In reference to Lake County, which is traversed by the ordered extension, the Commission said:

> Large stands of timber are located within this county. The standing timber is estimated at 14 billion feet, of which 6 billion are in the National Forest Reserves. It is estimated that this timber will provide for the proposed line 2,000 carload shipments annually for a period of 50 years. (Rep. 644, R. 64.)

In the earlier report special mention was made of the timber in the southwestern counties of Oregon. In these counties, the Commission said, there are 180 billion feet of standing timber, chiefly fir, 56 billion feet of which are under Federal ownership.

> A large part of this, upon the construction of tap lines, could move as regular traffic over a direct route across central Oregon to middle western and eastern markets, if given equal car supply and rates with other routes. The National Government has authorized the sale of large stands in remote districts, sometimes with the provision that a substantial part of the sale price shall be devoted to the construction of common carrier railroads for general development of the district. (R. 1866.)

When the Commission said in its second report that "There is also substantial evidence that construction of feeder lines by other companies in western Oregon would follow construction of the proposed

extension and that such lines would bring to the proposed line considerable traffic" (Rep. 662, R. 80), the Commission undoubtedly had in mind, in part, the enormous lumber traffic which could be developed by the construction of such lines from the extension ordered into this vast body of timber.

A "Timber Map of Oregon," of record as Exhibit 17 (exhibits physically reproduced) published by the State Board of Forestry, shows at a glance the location of the ordered extension with reference to Oregon timber. The locations and quantity of timber in the State are shown on the map by stars, each star representing 50 million feet of standing timber.[16] It will be seen from the map that the western terminus of the ordered extension is in the midst of a vast body of timber. The possibilities of development of timber traffic by the construction of short extensions or branches from the line ordered or by the construction of feeder lines by other companies or the construction of logging railroads by lumber companies is apparent from the map.

"The best expert opinion points to a heavy increase in the volume of shipments of lumber from

[16] The solid red line on this map shows the location of the ordered extension. The broken red lines show the locations of alternate routes proposed by the Bend interests which were not adopted by the Commission. The black lines in western Oregon are the lines of the Southern Pacific Company except the black line south from Bend, which is the new Bend-Klamath Falls line of the Great Northern. The black line on the east is part of the Ontario-Burns branch of the O.-W. R. & N.

the north Pacific Coast, *to meet which an adequate transportation machine is imperative.*" (First report, R. 1864.) And it is true, as also stated in the first report, that—

> with the dimunition of the available supply from the Southern States, the supply of standing timber in Oregon must be looked to by the whole country as of increasing and prime importance. (R. 1863.)
>
> The public interest in this comprises the individual producers, and their consuming customers in other sections; the State, which finds in lumber its principal industry; and the Federal Government, as the proprietor of national forests which contain more than 130,000,000,000 feet of timber. (R. 1864.)

9. The extension ordered will tend to furnish desirable carrier competition in a wide territory now wholly dependent upon one carrier

There is much testimony of record to the effect that it is the policy of large lumber companies not to locate important mills at points served by only one carrier. (R. 186, 187, 644, 645.) What was said by the Commission in its first report herein in reference to the application of the Oregon Trunk (Great Northern subsidiary) to build its line from Bend to Klamath Falls is relevant here:

> The advantages of a diversified car supply, recognized in the coal industry, are equally important to lumber producers. They are the possibilities of failure of operation or of management, calamities, labor disturbances, and surplus production or consumers' demands

upon one railroad, which might well be overcome if the service of another carrier were available. Especially would this be a probability where the two carriers approach from different directions and meet at the common point. Competition as a stimulus for efficient operation has been recognized by us. As was the case in *Construction of Line by Wenatchee Southern Ry. Co.*, 90 I. C. C. 237, 256, important and growing industries on the line proposed are shown to require efficient transportation. Notwithstanding all that may be said favorable to the dominant carrier in this section and its present service, it has failed at times to meet demands made upon it. Advantages to the shippers of an additional outlet for their product are apparent. It is desirable that transportation facilities of high order be available to shippers from the Klamath Basin and central Oregon. The assurance of access to lines other than the Southern Pacific at critical periods is a factor of prime importance to such shippers and is clearly in the public interest. It is probable the competition afforded would stimulate the Southern Pacific to further improve its service. Competition, within reason, rathern than monopoly, is in the public interest.[17] (R. 1875–1876.)

"Shippers of lumber and other commodities in the State of Washington seldom experience car shortages as severe as those met in the Willamette Valley," the Commission said in its earlier report.

[17] This holding was cited with approval in *Ches. & Ohio Ry. United States*, 283 U. S. 35, 43.

> They enjoy greater carrier competition, and in most instances have available the empty cars of more than one system. The marketing of Oregon timber is languishing in comparison with that of Washington and California. The reason, as stated by an experienced witness, is that operators who contemplate the erection of mills find no carrier competition in Oregon and go to Washington, where there are more railroads and an ample supply of equipment in which to move the output. Thus they are in a better position to profit when lumber commands a premium in middle western and eastern markets. (R. 1861.)

Despite these facts the traffic carried by the Southern Pacific on its Oregon lines has shown marked increase. (R. 1861.)

Since that report was written the Great Northern has built its line south from Bend into the Klamath timber basin and now that territory is served by two carriers. But there is still no carrier competition west of the Cascades south of Eugene. That territory is served by the Southern Pacific only. The construction of the ordered extension of the Union Pacific lines will tend to furnish desirable carrier competition in that vast region.

Many other facts could be cited but we submit that those outlined above, without more, demonstrate the public need for the extension ordered and fully justify the order requiring its construction. As said in the Commission's report—

> Case after case might be cited where applications of the carriers for certificates covering

construction under less favorable circumstances, as related to probable traffic, revenues, and public benefit, than are present in this case have been granted. There can be no justification for granting requests of the carriers under given circumstances and under similar or more favorable circumstances denying appeals of the people for relief and for a reasonable chance to develop a great State. There can be no better criterion or guide to follow in determining what the carriers, including the defendant carriers, consider a prudent investment which is justified in the interest of public convenience and necessity than the instances where certificates have been sought and granted authorizing construction of rail extensions. (R. 81–82.)

IV

The extension here required by the Commission's order is one reasonably necessary to reach communities and industries in the territory which the carrier has professed to serve

The court below sustained the constitutionality of the extension provision of section 1 (21) when interpreted as limiting the power "to such extensions as are reasonably necessary to reach communities and industries in the territory which the carrier has professed to serve or according to the undertaking which it has expressly or impliedly assumed." (R. 163–164.) But the court found that "one of the dominant purposes of the order complained of was to require the petitioner to construct a line of railroad 185 miles in length in order that lumber traffic originating perhaps hundreds of miles from its present lines [having refer-

ence to the lumber traffic of western Oregon] might find a shorter route to eastern markets, and that traffic from southwestern Idaho might find a shorter route to northern California points," and that, therefore, "the carrier was plainly required to devote its property to a service which it has never professed to render and to a service entirely beyond the scope of the undertaking which it has expressly or impliedly assumed." (R. 163.) For this reason the court concluded that the order in question exceeds the authority of the Commission and is void. (R. 164.)

In so holding the court apparently overlooked the important fact that the extension ordered is in territory which this carrier has professed to serve. The purposes of the extension are many, but the ultimate aim is to afford more adequate transportation to the State of Oregon as a whole. The Union Pacific system, of which the O.-W. R. & N. is a dependent part, is one of the principal carriers to which the State must look for its transportation service. The Union Pacific has many miles of main and branch lines in Oregon. Crossing the Snake River, its main line enters Oregon in the southeastern portion and extends across the State to Portland. Numerous branches from its main line serve various communities and sections of Oregon. (See Ex. 37.)

By these main and branch lines it holds itself out to serve those portions of Oregon that are tributary thereto.

By through routes and joint rates with the Southern Pacific, via Portland, Oreg., and via Ogden, Utah,

it carries the commerce of western Oregon destined to, and shipped from, points on its system, and points on various connecting railroads to the east. These joint rates with the Southern Pacific via Portland apply on lumber as well as on other traffic and they are the same as those applying over the route through Ogden.

Tne Union Pacific now actually participates in the transportation of much of this lumber traffic, receiving it from the Southern Pacific at Ogden or at Portland. The route via Southern Pacific to Crescent Lake, Oreg., thence O.-W. R. & N. and other Union Pacific lines would be the shortest of all the available routes, and elaborate, voluminous cost studies were submitted in the Commission proceeding to demonstrate that large economies could be effected by the Southern Pacific and Union Pacific systems through interchanging all this traffic at Crescent Lake. The route through Crescent Lake and the ordered extension would not only be the shortest but also the most economical, for it avoids heavy mountain grades over other routes which increase the cost of transportation. It was estimated that in the transportation of part of the transcontinental traffic alone—that is, such of the transcontinental traffic as is interchanged between the Southern Pacific and the Union Pacific at Ogden, Utah—those carriers could save $2,174,024 annually by using the Crescent Lake route as compared with the route via Roseville, Calif., and $859,781 annually as compared with the route via Alturas, Calif. (See Rep. 655, R. 74.)

But the Commission at no place said that the shorter route for the *lumber traffic* of western Oregon was one of the dominant purposes of the order. It was one of the many matters as to which there was evidence and which the Commission took into consideration.

It is true that one of the principal purposes of the extension ordered was to afford a shorter, more expeditious and more economical route to eastern markets for the commerce of western Oregon, not only of lumber but also of agricultural products such as apples, pears, peaches, berries, broccoli and other perishable fruits and vegetables requiring prompt and expeditious transportation.

The record establishes that this traffic now moves via Portland and the Union Pacific system lines. This being the shortest present route it is used for the transportation of this perishable traffic, which moves in refrigerator cars. If the extension were built, there is every reason to believe that the shippers would utilize the shorter and more expeditious route that it would afford. In that event, interchange of the traffic between the Southern Pacific and Union Pacific would take place at Crescent Lake instead of at Portland. On this subject the Commission's report has the following to say, at page 641:

> The available tonnage is that which it is considered will move over the proposed route after giving consideration to origin points, rates, mileage, and markets. In this study

it is assumed that these commodities would be transported over the most direct routes and so routed by the shippers. Shipments of broccoli originating in Douglas County on the line of the Southern Pacific are now routed by the shippers to Portland via Southern Pacific and then east over the Union Pacific lines. Similar routing over the proposed line is anticipated for the commodities and tonnage shown. The estimates are predicated upon the thought that for this amount of traffic the proposed line will afford the most direct and shortest route between origin and destination points and that this service will be of such value to shippers that they will exercise their privilege and route their shipments over this route. It is conceded, however, that the Southern Pacific may be able to control or influence the routing so that some of the anticipated tonnage for the proposed line may not be realized. * * *

It is anticipated that large quantities of perishable commodities going east from western Oregon will move over the proposed line to the present line of the Oregon Short line and there be combined with special perishable trains which are given expedited movement. (R. 60–61.)

After stating that the soil of the Rogue River Valley "is ideal for strawberries and loganberries," but that the valley "is best known for its pears, apples, and peaches, particularly pears"; that the adobe soil of the Umpqua Valley "produces a heavy yield of vegetables and from it comes some of the

best apples and pears produced in" the valley, the Commission said:

> Quicker transportation and shorter routes would be of much advantage in the transportation and marketing of the products of these valleys. A large part of the movement is under refrigeration and to eastern markets. The proposed construction would afford a shorter and more direct route from this territory to the east. (R. 65.)

In reference to the western Oregon traffic generally the Commission expressed the conclusion that—

> It does seem reasonable to assume that a substantial volume of western Oregon traffic will move to the east via the proposed line when consideration is given to the shortened mileage and the savings which it is shown can be brought about in transportation costs through the use of this route. (Rep. 663, R. 80.)

Nor did the Commission confine its attention to eastbound traffic from western Oregon. In presenting their evidence the complainants did not stress westbound traffic from the east to western Oregon but the Commission took note of such traffic which would "logically move via the proposed route." (Rep. 662, R. 80.)

As to southwestern Idaho traffic, this traffic originates on the lines of the Union Pacific system. When it moves to the east it is transported by the Oregon Short Line and the Union Pacific through Granger. When it moves to California points it is transported

by the Oregon Short Line either to Ogden thence Southern Pacific or Los Angeles & Salt Lake (also a Union Pacific system line) or to Wells, Nev., thence Southern Pacific or Western Pacific. When it moves to Portland or the Pacific northwest it is transported by the Oregon Short Line thence Oregon-Washington R. & N. Co., through Huntington. If the ordered extension were built the traffic would move over the Oregon Short Line, thence over the Ontario-Burns branch (owned by the O.-W. R. & N., but operated by the O. S. L.) to Crane thence over the extension to Crescent Lake where it might be diverted either northward to Portland or other markets or southward to California. (See Commission's report, pp. 649–664, R. 68–73, under the heading "Southwestern Idaho.")

Thus it appears that the holding of the court below that the carrier was required to devote its property to a service beyond the scope of its undertaking is erroneous as a matter of fact. We submit that its holding is also erroneous as a matter of law, for it is based on the proposition that a carrier is under no duty with respect to traffic originating at points not *directly* served by its lines. In *Wisconsin, Minn. & Pac. R. R.* v. *Jacobson*, 179 U. S. 287, decided as long ago as 1900, an objection to the order requiring the construction of the track connection was that it "would require the company to go outside of its right-of-way and to condemn land for that purpose," and that it would require

the company to receive and transport over its line traffic originating at points on the other road. These objections were overruled.

If Congress is without power to require a carrier in the interest of public convenience and necessity and the development of an adequate national transportation service to enlarge its facilities for the reasons assigned by the court, then it would seem that Congress is without power to require the construction of a track connection between the main lines of interstate carriers, *Alabama & Vicksburg Ry.* v. *Jackson & Eastern*, 271 U. S. 244, *Wisconsin, Minn. & Pac. R. R.* v. *Jacobson*, 179 U. S. 287, or the construction of a switch connection with a lateral branch line of railway, *C. C. C. & St. L.* Ry. *Co.* v. *United States*, 275 U. S. 404, or the construction of a connecting track to the dock of a water carrier, *United States*, v. *New York Central R. R. Co.*, 272 U. S. 457, or even the establishment of through routes and joint rates, *U. S.* v. *American Ry. Exp. Co.*, 265 U. S. 425, 435, *St. Louis S. W. Ry.* v. *United States*, 245 U. S. 136, 142, compare *Minneapolis & St. Louis Ry. Co.* v. *Minn.*, 186 U. S. 257, and *Missouri & Illinois Coal Co.* v. *I. C. R. R. Co.*, 22 I. C. C. 39, 44–46. For in all such instances the carrier would be required to engage in a new service which it had not theretofore professed to render.

In determining that the extension ordered is reasonably required in the interest of public convenience and necessity the Commission took into consideration the above facts and many others, and it is

difficult to say which were the dominant purposes of the order, but in addition to affording a shorter, more expeditious and more economical route for the transcontinental traffic to and from western Oregon and for traffic between southwestern Idaho and the Pacific coast, an important purpose of the ordered extension was to afford more adequate transportation service to eastern and central Oregon. That territory is now served by the O.-W. R. & N. and other Union Pacific system lines. The Ontario-Burns branch, of which the required extension would be an elongation, projects westerly from the eastern boundary of Oregon, 157 miles into the interior, reaching almost to the geographical center of the state. The branch extends across Malheur County, which borders Idaho on the east, enters Harney County and runs about half way across that county to Burns. The short portion of this branch that lies in Harney County is the only railroad service which that county enjoys. (See Map, Ex. 15, part 2). There is much farming, although livestock is its principal industry. (R. 645.) Cattle, sheep, wool, hogs, and horses, raised in Harney County, are shipped over the O.-W. R. & N. from Crane. (R. 645.) As to much of the territory to be served by the extension ordered, the Ontario-Burns branch is now the nearest railroad.

The branch of the O.-W. R. & N. extending from the Columbia River southerly to Bend, 151 miles, reaches the central portion of the state. Bend is in Deschutes County, immediately north of Lake County, which would be crossed by the ordered

extension. Crescent Lake, the western terminus of the extension, is in Klamath County, adjoining Lake County on the west and Deschutes County on the south. Thus it may be said that the whole territory of eastern and central Oregon which is to be more adequately served by the construction of the extension ordered is now tributary to the O.-W. R. & N.

Moreover, for many years the O.-W. R. & N. held a franchise to build the extension which is here ordered. Its articles of incorporation, taken out November 23, 1910, permitted it to own and operate:

> 18. That part of the railroad and telegraph lines projected and proposed to be constructed by Oregon Eastern Railway Company, consisting of: (a) A line from Vale across the State of Oregon to a point at or near Odell, in said State; * * * (R. 1897, 1901.)

Vale is a point on the Ontario-Burns branch of the O.-W. R. & N., in Malheur County, about 15 miles west of Ontario. Odell is a point now on the Natron Cut-off just north of Crescent Lake. See Exhibit No. 15, part 2, Rand McNally map of Oregon.

This franchise was evidently availed of in the construction of the Ontario-Burns branch west of Vale, originally to Juntura in 1913, then to Riverside in 1915, and to Crane, in the Harney Valley, in 1916. (Original report p. 17, R.)

At the time of the filing of the Oregon Commission's petition in this proceeding on May 24, 1927, the O.-W. R. & N. still held this franchise. One year thereafter, or on July 3, 1928, the O.-W. R. & N.

caused the franchise to be amended so as to authorize construction and operation only from Vale to Burns. (R. 1905.) (The original construction from Ontario to Vale was by an independent company.)

Although this permissive franchise did not compel the company to build the line, nevertheless the fact that it held this franchise was no doubt sufficient to discourage any other carrier from attempting to enter the territory. In this broad sense, at least, the Union Pacific has "occupied the territory." [18]

In reaching its conclusion that the Commission's order is unconstitutional and void because it requires the carrier to build an extension to serve territory which it had not professed to serve, the court in effect applied the principle which has been established in cases involving compulsory extensions of gas, electric light, water, and telephone service. This principle is that such public utilities may be compelled by regulating authorities to extend their mains, wires, or pipes to communities not served, if the community is within the territory covered by the utility's franchise. In *New York & Queens Gas Co.* v. *McCall*, 245 U. S. 345, which is probably the leading case of this kind, the gas company was required by order of

[18] In *Atchison, T. & S. F. Ry. Co.* v. *Railroad Commission*, 173 Cal. 577, 160 Pac. 828, cited by the court below, the Supreme Court of California suggested that "the area served by any railroad may, in a certain sense, be said to include all of the territory, in any direction, from which freight or passengers may be brought to the railroad by any other mode of conveyance. Such area may extend to a distance of many miles from the line of the road."

the Public Service Commission of New York to build an extension to its gas mains and pipes so as to accord service to a community which the company had failed and refused to serve. The length of the extension ordered was about one and one-half miles, but the nearest mains of the company were being used to almost their full capacity, and for this reason the estimated cost of making the improvement included new mains of some eight miles in length. (*Ibid.* 349–350.) The case was presented to this Court upon the single assignment of error—

> That the order of the Public Service Commission * * * was illegal and void, in that it deprived the above named New York and Queens Gas Company of its property without due process of law and denied to it the equal protection of the laws, in violation of the Fourteenth Amendment to the Constitution of the United States, in requiring the said company to extend its distributing system, under great physical difficulties and at enormous expense, to an independent and remote community which the said company was under no present duty to supply with gas, when it appeared that the said Gas Company would not obtain an adequate return from the expenditure required to make such extension.

In sustaining the order the Court noted the fact that the company had franchises authorizing it to manufacture and sell gas in the community to be served, and said that inasmuch as the appellant was

> the only company which had franchises for any part of that area, the community to which it

was ordered to extend its distributing system must continue without gas if the order does not become effective. (*Ibid.*, 349.)

New York ex rel. v. *Pub. Ser. Com.*, 269 U. S. 244, is a similar case. There the Woodhaven Gas Light Company was required by order of the Commission, which the court upheld, to extend its mains to furnish gas to five communities, and compliance with the order required the addition of about 16 miles of main. The gas company challenged the validity of the order "on the ground that it confiscates the company's property, is arbitrary and capricious, and therefore repugnant to the due process clause of the Fourteenth Amendment." It did "not appear that any other utility is authorized to furnish gas there, and it is to be assumed that these communities are dependent upon this company for service," and the court said that "when reasonably required, the company is in duty bound to furnish gas to inhabitants of the territory covered by its franchise." (*Ibid.*, 247.)

This principle, applicable in cases involving extensions of service by such public utilities as have been given franchises for definite territories, we submit, is not applicable to extensions of railroad lines. Railroads are not given franchises conferring upon them the right to serve exclusively any particular territory, district, or community. Hence, no extension of a railroad line could under any circumstances be required if it were necessary to find, as a condition precedent, that the railroad held an exclusive franchise which gave it alone the right to

serve the territory. Nevertheless, a railroad owes a duty to the territory through which it has been given a franchise to construct a railroad. The Transportation Act places a duty upon railroads, in the interest of public convenience and necessity, to adequately serve and develop the territory through which their lines run. In enacting section 1 (21) Congress adopted the reasoning upon which the recommendation for the provision rested, that a railroad that had been given a public franchise and the powers that go with it to build into a given territory should be required adequately to serve and develop that territory. Congress, in the exercise of its plenary power to regulate interstate commerce, may enforce this duty by providing, as it did in Transportation Act, 1920, that when public convenience and necessity demand the construction of an extension, the carrier may be required to construct it when the necessary expenditure will not "impair" its strength.

V

The provision under which extensions of rail lines may be required in cases where the specified conditions are fully met is one of many provisions of Transportation Act, 1920, *in pari materia*, having for their ultimate purpose the development and maintenance of an adequate national transportation system. The provision is therefore a valid exercise of the plenary power of Congress to regulate interstate commerce

We have seen that the provisions of the Transportation Act relating to construction and extension of railway lines had their inception in the Commission's recommendations which were inspired by the underlying thought, growing out of experience gained from

unified operation of the carriers by a governmental agency, that the fundamental aim or purpose of the new legislation should be to secure safe, efficient transportation adequate for the nation's needs.

Since the passage of the Act many of its provisions have come under review by this Court, whose decisions have fully recognized and given eloquent expression to the ultimate purpose and aim of this legislation. These decisions too have sustained the constitutional validity of the most important of the new provisions; and although the particular provision for assuring railway construction to the extent required by the public necessity and convenience has not been directly passed upon, it is *in pari materia* with provisions that have been upheld, and its validity has been assumed. *R. R. Comm.* v. *Southern Pac. Co.*, 264 U. S. 331, 344; *Alabama Ry.* v. *Jackson Ry.*, 271 U. S. 244, 249.

Wisconsin R. R. Comm. v. *C. B. & Q. R. R. Co.*, 257 U. S. 563, was one of the first cases coming before this Court under the new act. Section 15a, "the most novel and most important feature of the act," the Chief Justice said, "requires the Commission so to prescribe rates as to enable the carriers as a whole, or in groups selected by the Commission, to earn an aggregate annual net railway operating income equal to a fair return on the aggregate value of the railway property used in transportation," for two years the return to be 5½ per cent, with ½ per cent for improvements, and thereafter to be as fixed by the Commission. "The act sought to avoid excessive incomes

accruing, under the operation of section 15a, to the carriers better circumstanced, by using the excess for loans to the others and for other purposes. The act further put under the control of the Interstate Commerce Commission, 1st, the issuing of future railroad securities by the interstate carriers; 2nd, the regulation of their car supply and distribution and the joint use of terminals; and, 3rd, their construction of new lines, and their abandonment of old lines. The validity of some of these provisions has been questioned. Upon that we express no opinion. We only refer to them to show the scope of the congressional purpose in the act." The Chief Justice then referred to the purpose of the Act:

> It is manifest from this very condensed recital that the act made a new departure. Theretofore the control which Congress through the Interstate Commerce Commission exercised was primarily for the purpose of preventing injustice by unreasonable or discriminatory rates against persons and localities, and the only provisions of the law that inured to the benefit of the carriers were the requirement that the rates should be reasonable in the sense of furnishing an adequate compensation for the particular service rendered and the abolition of rebates. The new measure imposed an affirmative duty on the Interstate Commerce Commission to fix rates and to take other important steps to maintain an adequate railway service for the people of the United States. This is expressly de-

clared in section 15a to be one of the purposes of the bill.

The Court pointed out that there is a "dovetail relation" between the provision in section 13 (4) and the purpose of section 15a.

There is a similar dovetail relation between the provisions in section 1 (21) and the purpose of section 15a. The latter section provides for rates to yield a fair return fixed at a level which gives due consideration to the transportation needs of the country and the necessity of enlarging existing transportation facilities in order to provide the people of the United States with adequate transportation. The provision in section 1 (21) is one of the specific instances of enlargement of such transportation facilities contemplated and expressly provided for in the statute.

Further illustrative of the close relation between section 1 (21) and other provisions of the Transportation Act is the decision in *R. R. Comm.* v. *Southern Pac. Co.*, 264 U. S. 331, 347, pointing out that section 20a, the securities section, "is of course *in pari materia* with the restriction of paragraph 21" of section 1 "to prevent a possible impairment of the financial ability of interstate carriers to discharge their interstate commerce duties."

The constitutionality of the recapture clause of section 15a came directly before the Court in *Dayton-Goose Creek Ry.* v. *United States*, 263 U. S. 456. It was urged that the cutting down of income actually received by the carrier for its service to a so-called fair return is a plain appropriation of its property

without compensation. In sustaining the constitutionality of the clause the Court considered the purpose of the Transportation Act as a whole, and, at page 478, said:

> The new act seeks affirmatively to build up a system of railways prepared to handle promptly all the interstate traffic of the country. It aims to give the owners of the railways an opportunity to earn enough to maintain their properties and equipment in such a state of efficiency that they can carry well this burden. To achieve this great purpose, it puts the railroad systems of the country more completely than ever under the fostering guardianship and control of the Commission, which is to supervise their issue of securities, their car supply and distribution, their joint use of terminals, their construction of new lines, their abandonment of old lines, and by a proper division of joints rate, and by fixing adequate rates for interstate commerce, and in case of discrimination, for intrastate commerce, to secure a fair return upon the properties of the carriers engaged.

It was insisted that the power to regulate interstate commerce is limited to the fixing of reasonable rates and the prevention of those which are discriminatory, and that when these objects are attained the power of regulation is exhausted. The Court rejected this as "too narrow a view of the commerce clause," stating:

> To regulate in the sense intended is to foster, protect, and control the commerce with appro-

priate regard to the welfare of those who are immediately concerned, as well as the public at large, and to promote its growth and insure its safety. [Citing cases.]

The Transportation Act was again considered by the Court in the *New England Divisions Case*, 261 U. S. 184, decided at the October term, 1922. Prior to that Act, the Court said, the effort of Congress had been directed mainly to the prevention of abuses, particularly those arising from excessive or discriminatory rates. The 1920 Act, which introduced into the Federal legislation a new railroad policy, "sought to ensure, also, adequate transportation service. That such was its purpose, Congress did not leave to inference. The new purpose was expressed in unequivocal language." Thus: To enable the carriers "properly to meet the transportation needs of the public," to give due consideration to "the transportation needs of the country, * * * and the necessity * * * of enlarging [transportation] facilities," to "best meet the emergency and serve the public interests," to "best promote the service in the interest of the public and the commerce of the people"; "that the public interest will be promoted."

To attain the new purpose "new rights, new obligations, new machinery were created. The new provisions took a wide range." Among them are the establishment of the railroad labor and the adjustment boards; the provisions for raising capital, by new government loans; by loans from the railroad

contingent fund (the recapture provision of section 15a); those placing the issue of new securities under the control of the Commission, unaffected by the laws of the several states; the provision for consolidation of railways into a limited number of systems; provisions for securing adequate car service; for joint use of terminals; for routing; for interchange of traffic between railroads, and between a railroad and water carrier. Prominent among the new provisions "are those especially designed to secure a fair return on capital devoted to the transportation service." To this end, also, the Commission was empowered, among other things, to permit pooling of traffic or earnings; to authorize abandonment of unprofitable and unnecessary lines; to fix minimum as well as maximum rates, and thus prevent cut-throat competition and the taking away of traffic from weaker competitors; to prevent the depletion of interstate revenues by discriminating intrastate rates; and to determine the division of joint rates.

> The existence of the varying needs of the several lines and of their widely varying earning power was fully realized. It was necessary to avoid unduly burdensome rate increases and yet secure revenues adequate to satisfy the needs of the weak carriers. To accomplish this two new devices were adopted: the group system of rate making and the division of joint rates in the public interest. Through the former, weak roads were to be helped by preventing needed revenue from passing to prosperous connections. Thus, by marshalling the

> revenues, partly through capital account, it was planned to distribute augmented earnings, largely in proportion to the carrier's needs. This, it was hoped, would enable the whole transportation system to be maintained, without raising unduly any rate on any line. The provision concerning divisions was, therefore, an integral part of the machinery for distributing the funds expected to be raised by the new rate-fixing sections. It was, indeed, indispensable.

In sustaining the Commission's order which increased the divisions of the New England lines with special reference to their financial needs, the Court rejected the contention that if the Act be construed as authorizing such apportionment of a joint rate on the basis of the greater needs of particular carriers, it is unconstitutional.

Texas v. *Eastern Texas R. R. Co.*, 258 U. S. 204, dealt with the abandonment provisions of paragraphs 18, 19, and 20 of section 1, and the Court said "*their validity will be undoubted,*" if they be construed as not clothing the Commission with any authority over the discontinuance of the purely intrastate business of a road whose situation and ownership are such that interstate and foreign commerce will not be burdened or affected by a continuance of that business. See also *Colorado* v. *United States*, 271 U. S. 153; *Texas, etc., R. R.* v. *Northside Ry.*, 276 U. S. 475.

In *Ches. & Ohio Ry.* v. *United States*, 283 U. S. 35, 42, the Court, referring to section 1 (18)–(20), said:

> Undoubtedly the purpose of these provisions is to enable the Commission, in the interest of the public, to prevent improvident and unnecessary expenditures for the construction and operation of lines not needed to insure adequate service. In the absence of a plain declaration to that effect, it would be unreasonable to hold that Congress did not intend to empower the Commission to authorize construction of new lines to provide for shippers such competing service as it should find to be convenient or necessary in the public interest. Indeed Section 5 (4) of the Act, authorizing the Commission to adopt a plan for the consolidation of railway properties into a limited number of systems, clearly discloses a policy on the part of Congress to preserve competition among carriers. It provides: "In the division of such railways into such systems under such plan, competition shall be preserved as fully as possible and wherever practicable the existing routes and channels of trade and commerce shall be maintained." And the Commission has recognized the advantages of competitive service to shippers especially in respect of a diversified car supply for the shipment of coal and lumber; it suggests the possibility of failure of operation from various causes, that under some circumstances competition operates to stimulate better service and that reasonable competition may be in the public interest. Construction of Lines in Eastern Oregon,

111 I. C. C. 3, 37. Construction of Line by Wenatchee Southern Ry., 90 I. C. C. 237, 257.

The provisions of paragraphs 18–20 of section 1 prohibiting a carrier from constructing an extension to its line unless authorized by the Commission's certificate of public convenience and necessity, were considered in *Texas & Pacific Ry. Co.* v. *Gulf, Colorado & Santa Fe Ry.*, 270 U. S. 266. An industrial district near Dallas, Tex., was served exclusively by the Texas & Pacific. The Santa Fe attempted to build an extension of its line into that district in order to compete with the Texas & Pacific for the traffic. But the Santa Fe had not secured a Commission certificate authorizing the construction and for this reason an injunction was issued restraining the carrier from building the extension until or unless such a certificate was secured.

By Transportation Act, 1920, the Court said:

> Congress undertook to *develop* and maintain for the people of the United States, an adequate railway system. It recognized that preservation of the earning capacity, and conservation of the financial resources, of individual carriers is a matter of national concern; that the property employed must be permitted to earn a reasonable return; that the building of unnecessary lines involves a waste of resources and that the burden of this waste may fall upon the public; that competition between carriers may result in harm to the public as well as in benefit; and that when a railroad inflicts injury upon its rival, it may be the

public which ultimately bears the loss. [Citing cases.] The Act sought, among other things, to avert such losses.

In such a case—that is, one where a particular district or territory is served exclusively by a particular carrier—it may conceivably be more in the public interest that the district or territory continue to be served by the particular carrier without competition from other carriers. In the exercise of the discretion conferred upon it by paragraphs 18–20, the Commission may, then, refuse to issue a certificate authorizing a competing carrier to build into the district or territory. Yet that district or territory may be inadequately served. By the exercise of the affirmative power conferred upon it by paragraph 21, the Commission may require the carrier who has thus been given a virtual monopoly of the territory to construct necessary extensions. The provision in paragraph 21 is therefore a desirable and necessary corollary of the provisions of paragraphs 18–20.

Moreover, the provision of paragraph 21 may rise to much greater importance than it has had in the past when the present plan of railway consolidation is consummated. It is a matter of common knowledge that the consolidation plans are taking shape. The plan formulated by the Commission, *Consolidation of Railroads*, 159 I. C. C. 522, provides for the consolidation of the railroads of the country, about 2,000 in number, into 21 systems, and while section 5 of the Act requires that "competition shall be preserved as fully as possible," it is obvious that the consolidation

of several roads now serving a given territory into one system will give that system a practical monopoly in that territory. Indeed, this is the underlying thought of the consolidation plan—to eliminate duplication and waste and obtain for the public the resulting benefits and economies, and application of the thought that the elimination of wasteful competition by combination subject to regulation is in the public interest. One carrier will be given the right to serve a given territory. Unless that carrier can be compelled to build extensions within that territory and fully occupy and develop it to the extent the public interest requires, it will result that its commerce, present and prospective, and its development, will be virtually dependent upon the will of the carrier, and in the event the carrier is unwilling to extend its facilities as here, the public in that territory who are denied the benefit of railroad service will have no means of redress.[19]

[19] System No. 12 of the Commission s plan, 159 I. C. C. 522, 538, consolidates the Great Northern and the Northern Pacific along with numerous other railroads. In a separate expression, *ibid.*, page 573, the following was quoted from *Pearsall* v. *Great Northern Ry.*, 161 U. S. 646:

"The consolidation of these two great corporations will unavoidably result in giving to the defendant a monopoly of all traffic in the northern half of the State of Minnesota, as well as of all transcontinental traffic north of the line of the Union Pacific, against which public regulations will be but a feeble protection."

VI

The extension ordered is such an enlargement of transportation facilities as is contemplated by the Act, provision for which is made by rate adjustment to yield revenue sufficient to provide a return fixed at a level which takes into consideration the necessity of providing adequate national transportation service

Transportation Act, 1920, which "seeks affirmatively to build up a system of railways prepared to handle promptly all the interstate traffic of the country" (*Dayton-Goose Creek case*, 263 U. S., 478), prescribed the means and provided for the capital whereby that end may be accomplished. Section 15a directed that the Commission modify or adjust the rates so that the carriers as a whole or in groups will, under honest, efficient, and economical management and reasonable expenditures for maintenance of way, structures and equipment, earn a fair return upon the aggregate value of their railway properties.

The Commission is to determine what percentage of such aggregate property value constitutes a fair return thereon and the Commission is directed that—

> In making such determination it shall give due consideration, among other things, to the transportation needs of the country and the necessity (under honest, efficient, and economical management of existing transportation facilities) *of enlarging such facilities in order to provide the people of the United States with adequate transportation:* * * *.

The provisions of section 1 (21) obviously constitute specific instances of enlarged transportation facilities such as contemplated in section 15a.

Immediately after the passage of the 1920 Act the Commission, pursuant to section 15a, granted the carrier here involved, along with all other interstate carriers, substantial horizontal increases in all of its rates and fares. The increases in freight rates ranged from 25 to 40 per cent. *Ex Parte 74, Increased Rates, 1920*, 58 I. C. C. 220; *Wisconsin R. R. Comm.* v. *C., B. & Q. R. R. Co.*, 257 U. S. 563; *New York* v. *United States*, 257 U. S. 591. Since the underlying purpose of section 15a was to maintain and enlarge the transportation facilities of the country in order to provide the people of the United States with adequate transportation, it is obvious that the rate increases granted pursuant to that section had the purpose in view of providing a return sufficiently high to provide the capital necessary to pay for such facilities.

Thus it may fairly be said that the expense involved in enlarging existing transportation facilities, such as the construction of a needed extension in order to provide "a reasonable chance to develop a great state" (Commission's report, p. 664, R. 82), is not uncompensated, but, on the contrary, the additional funds to be used for that purpose are provided by statutory enactment passed in advance for increased rates. In a broad sense, therefore, the enlarged facilities are paid for by the public, and after they are provided they will belong to the carrier and enable it to earn additional revenue at the same rates.

The *New England Divisions Case* is a concrete example of the operation of section 15a in maintain-

ing necessary existing transportation facilities. The transportation services performed by the New England lines were of importance to the public, yet their deficiency in income in 1920 was so great that (even before the raise in wages ordered by the Railroad Labor Board) an increase in freight revenues of 47.40 per cent was estimated to be necessary to secure to them a fair return. In *Ex Parte 74, Increased Rates, 1920, supra*, the Commission had ordered that freight rates in the eastern group which included New England, as well as the territory immediately west of the Hudson River, be raised 40 per cent. The Commission ordered that the divisions to be accorded the New England lines out of the joint rates thus raised should be increased by 15 per cent. "What the Commission did," the Court said, 261 U. S. 184, at page 196—

> was to raise the additional revenues needed by the New England lines, in part, directly, through increase of all rates 40 per cent and, in part, indirectly, through increasing their divisions on joint rates.
>
> In other words, the additional revenue needed were raised partly by a direct, partly by an indirect tax. It is not true, as argued, that the order compels the strong railroads to support the weak. No part of the revenues needed by the New England lines is paid by the western carriers. All is paid by the community pursuant to the single rate increase ordered in *Ex parte 74*. If, by a single order, the Commission had raised joint rates throughout the

> eastern group 40 per cent, and, in the same order, had declared that 90 per cent of the whole increase in the joint rates should go to the New England lines (in addition to what they would receive under existing divisions), clearly nothing would have been taken from the Trunk Line and Central Freight Association carriers, in so ordering. (*Ibid.*, 196.)

It was contended that the Commission's order was void, because its purpose was not the establishment of divisions just, reasonable and equitable, as between connecting carriers, but, in the public interest, to relieve the financial needs of the New England lines, so as to keep them in effective operation. The argument was that Congress did not authorize the Commission to exercise its power to accomplish that purpose. After stating this contention the Court used the language hereinbefore quoted which explained the purpose of the 1920 act to ensure adequate transportation service. Then the Court pointed out that—

> The credit of the carriers as a whole had been seriously impaired. To preserve for the nation substantially the whole transportation system was deemed important. By many railroads funds were needed, not only for improvement and expansion of facilities, but for adequate maintenance.

And the Court developed the thought that the provision of the 1920 act concerning divisions was an integral part of the machinery for distributing the funds expected to be raised by the new rate-making sections. It overruled the argument "that

the division of a joint rate is essentially a partition of property; that the rate must be divided on the basis of the service rendered by the several carriers; that there is no difference between taking part of one's just share of a joint rate and taking from a carrier part of the cash in its treasury; and, thus, that apportionment according to needs is a taking of property without due process" on the ground that the argument begged the question. "What is its just share?—It is the amount properly apportioned out of the joint rate. That amount is to be determined, not by an agreement of the parties or by mileage. It is to be fixed by the Commission; fixed at what that board finds to be just, reasonable, and equitable. Cost of the service is one of the elements in rate making. It may be just to give the prosperous carrier a smaller proportion of the increased rate than of the original rate. Whether the rate is reasonable may depend largely upon the disposition which is to be made of the revenues to be derived from it."

Thus it is plain that in that case part of the additional revenues provided by the rate increases ordered in pursuance of section 15a were used for the purpose of maintaining transportation systems whose continued services were of importance to the public.

So the additional revenues provided by rates increased pursuant to section 15a may be required to be used in enlarging transportation facilities by construction of an extension needed by the public and necessary to afford adequate transportation service.

The requirement that the additional funds shall be used for this purpose is not a taking of the carrier's property.

The *Dayton-Goose Creek case* also sustains the principle upon which the validity of the compulsory extension provision rests. That which is recapturable is the excess over a fair return. This is taken by the Government and used in the maintenance and development of adequate transportation through administration of the revolving fund. The rate of return, as previously shown, is to be fixed at a level which takes into consideration the necessity of enlarging existing transportation facilities.[20] If the recapture of the excess income is not a taking of the carrier's property, then it seems to follow that the requirement that part of the revenue produced by rates fixed so as to yield a return high enough to enable enlargement of transportation facilities does not take the carrier's property.

Further it is to be observed that the capital expenditure necessary to construct an ordered extension will add value to the railway property held for and used

[20] The record shows that the Union Pacific System earned on the $222,291,600 par value of the stock of the Union Pacific Railroad Company, 15.40 per cent in 1925, 16.64 per cent in 1926, and 16.05 per cent in 1927. In those years the surpluses for common stock of Union Pacific Railroad Company were $34,230,639.35 in 1925, $36,997,332.54 in 1926, and $35,683,495.22 in 1927. In each of the three years 10 per cent dividends on the common stock of $22,229,160 were paid. This left surpluses, transferred to profit and loss, of $12,001,479.35 for 1925, $14,768,172.54 for 1926, and $13,454,335.22 for 1927. (Exhibits 39 and 40, page 5.)

in the service of transportation, upon which the carriers will be entitled under section 15a to earn a fair return. The expenditure is for property which will belong to the carrier and be employed in its business. The money is not taken from the carrier and given to others, nor is the use of the facilities to be uncompensated. Like other property employed by the carrier in the transportation of persons or property, the facilities have a real bearing on the rates which it is entitled to charge. Therefore, an enforced discharge of the duty to provide a facility reasonably adequate for serving the public does not amount to a taking of property without compensation. Compare *C. & N. W. Ry. Co.* v. *Ochs*, 249 U. S. 416.

Atchison, T. & S. F. Ry. Co. v. *Railroad Commission*, 173 Cal. 577, 160 Pac. 828, cited and quoted from in the opinion of the court below, held that an order of the State Commission requiring the Santa Fe to construct a 12-mile extension was a taking of the carrier's property in violation of the Fourteenth Amendment. But that case, and several other State Court cases to the same effect, were decided prior to the passage of the Transportation Act, 1920, and of course did not consider the requirement in the light of the provisions and purpose of that Act, of the new duties and requirements which it places upon carriers, and the benefits and advantages which it bestows upon them. The fact that those cases were not under, and did not take into consideration the fundamental aim and purpose of, the Transportation Act,

seems sufficient alone to differentiate those cases. The Commission's statement of the ultimate end to be accomplished by the new legislation is relevant in this relation:

> Transportation service and adequate service are demanded by the welfare, the industry, the commerce, and the social life of the whole people. Securing that class of service is more important than is the question of whether it shall be furnished at a slightly higher or a slightly lower charge. An adequate service can not be provided except from adequate revenues and as a result of adequate expenditures for maintenance, improvement, and expansion. Private capital can not be induced to invest in railroad securities unless it can be reasonably assured of the security of the investment and an appropriate return thereon. It necessarily follows that the patrons of the transportation companies must pay rates that will yield revenues sufficient to justify rendering the quantity and character of service demanded. The charges should not be higher than those that will yield proper compensation for the service performed and appropriate return upon the property devoted to the public use. If through enlightened, broadened, and wise regulation that proper balance between revenues, on the one hand, and returns to capital and expenditures in operation, maintenance, and improvement, on the other hand, can be established, the public will be well served at reasonable charges, the employees of the transportation companies will be ade-

quately compensated for their work, and the shippers and receivers will secure, at reasonable rates, an adequate service. It would seem to follow, necessarily, that the securities of the corporations would become stabilized and that when it becomes necessary to utter additional securities under governmental supervision, capital seeking investment would readily respond to the call. (Annual Report, 1919, page 6.)

VII

The requirement here in question, considered with regard to the interests both of the carrier and of the public, is reasonable and appropriate, meets the test of constitutional validity laid down by this court in cases which reviewed State commission orders, and does not take the carrier's property

In *Atchison Ry.* v. *Railroad Comm.*, 283 U. S. 380, the Court sustained an order of the California Railroad Commission requiring the appellants to construct a union passenger station in the City of Los Angeles, together with incidental connections, extensions, improvements, and terminal facilities, in substantial compliance with the plan outlined by the State Commission. That commission had found that "the present and future public convenience and necessity" required the construction of the union station, and that it could be constructed at a cost of approximately $10,000,000 in substantial compliance with the plan outlined, which was found to be in all essential respects similar to that considered by the Interstate Commerce Commission which had decided, 100 I. C. C. 421, that it was without authority to require the construction of the station, but, in

order to facilitate the disposition of the case, had made hypothetical certificates substantially as follows:

> (1) That the public convenience and necessity require the extensions of lines that may be necessary to reach and serve any union passenger station within the plaza which may be constructed in accordance with a lawful order of the State Commission and that may be necessary to provide for the incidental rearrangement of passenger and freight routes, and that the expense involved will not inpair the carriers' ability to perform their duties to the public. (2) That public convenience and necessity permit the abandonment of train service on Alameda Street and such other abandonments of lines as would ne necessary in connection with the establishment of any such station, so lawfully ordered by the State Commission.

The report of the I. C. C.—

> further found that such joint use of track or other terminal facilities as may be incidental and necessary to the proper operation of any such union station is in the public interest and is practicable, without substantially impairing the owning carriers' ability to handle their own business. (283 U. S., at p. 388.)

In overruling the contention of the appellants that the order of the State Commission deprived the railway companies of their property without due process of law, and denied to them the equal protection of the laws, in violation of the Fourteenth Amendment of the Federal Constitution, the Court said:

The principle that the State, directly or through an authorized commission, may require railroad companies to provide reasonably adequate and suitable facilities for the convenience of the comminities served by them, has frequently been applied. *Wisconsin, Minn. & Pac. R. Co.* v. *Jacobson*, 179 U. S. 287, 296, 301; *Atlantic Coast Line R. Co.* v. *North Carolina Corp. Comm.*, 206 U. S. 1, 26, 27; *Missouri Pacific Ry. Co.* v. *Kansas*, 216 U. S. 262, 279; *Seaboard Air Line Ry. Co.* v. *Railroad Comm.*, 240 U. S. 324, 327; *Mississippi R. R. Comm.* v. *Mobile & Ohio R. Co.*, 244 U. S. 388, 390, 391; *Erie R. Co.* v. *Public Utility Commrs.*, 254 U. S. 394, 409, 410. Railroad carriers may be compelled by state legislation to establish stations at proper places for the convenience of their patrons. *Minneapolis & St. L. R. Co.* v. *Minnesota*, 193 U. S. 53, 63. They may be required at their own expense to construct bridges or viaducts whenever the elimination of grade crossings may reasonably be insisted upon, whether constructed before or after the building of the railroads, *Missouri, Kansas & Texas Ry. Co.* v. *Oklahoma*, 271 U. S. 303, 307. But the power to regulate is not unlimited. "It may not unnecessarily or arbitrarily trammel or interfere with the operation and conduct of railroad properties and business." *Norfolk & Western Ry. Co.* v. *Public Service Comm.*, 265 U. S. 70, 74; *Mississippi Railroad Comm.* v. *Mobile & Ohio R. Co.*, *supra*. The question in each case is whether, in the light of the facts disclosed, the regulation is essentially an unreasonable

one. *Wisconsin, Minnesota & Pacific R. Co.* v. *Jacobson, supra; Norfolk & Western Ry. Co.* v. *Public Service Comm., supra.* And "the matter of expense is an important criterion to be taken into view in determining the reasonableness of the order." *Oregon R. & Nav. Co.* v. *Fairchild*, 224 U. S. 510, 529.

What is said in the decision in reference to the expense involved in constructing the union passenger station seems equally true in the case at bar:

> The expense involved in the plan adopted, when considered in relation to the importance of the interests affected and to be served, does not appear to be so large as to warrant the condemnation of the plan as unreasonable and beyond the authority of the State.

If the State may, without violating the Fourteenth Amendment, require interstate railroads to erect a monumental union passenger station, at a cost of approximately $10,000,000, in the interest of public convenience and necessity, it would seem that the Federal Government, within the limitations of the Fifth Amendment, can require the construction of the extension here ordered, where the expense involved is no greater, where the elements of public convenience and necessity are as great or greater, involving as it does the prosperity and the futute development of a large section of the country, and where the Interstate Commerce Commission has found, as it did in the *Los Angeles Station* case, that the necessary expenditure will not impair the carrier's ability to perform its duty to the public.

Moreover, the Commission's report is replete with figures showing the substantial revenues to be derived by the carrier from the movement of traffic over the extension, the construction of which "would bring about development in a vast territory" and would constitute "a valuable asset to the Union Pacific system." (Report 663, R. 80.)

In suggesting in its original report that the Union Pacific system should "complete that portion of its historic plan which is represented by the gap between Harriman (Crane) and the (Natron) cut-off," the Commission said that—

> In no other way now known can its great investment from Ontario to Burns be made to yield its running and fixed costs. (R. 1855.)

In this respect, the Commission said—

> its situation is similar to that of the Oregon Trunk at Bend, with a high grade line 151 miles long, an incomplete fragment of a larger plan, built on standards contemplating a greater use than it can have if unextended. (R. 1855.)

In its second report the Commission found that construction of the extension required by the order—

> would be of material benefit to the present Ontario-Burns branch. (Rep. 663, R. 80.)

It was the view of the properly constituted State authorities who urged the building of the extension that as the result of the development within the State as a whole which would follow its construction, both the existing and proposed facilities would enjoy increased traffic—that "the development which

would follow the proposed construction would result in all rail facilities within the State enjoying increased traffic." (Rep. 639, R. 59.)

In other words, the expenditure here required is for enlarged transportation facilities from the operation of which the carrier will obtain revenue. Apparently the facility required in the *Los Angeles Passenger Station case* will not be a revenue producer.

In *Wisconsin, Minn. & Pac. R. R.* v. *Jacobson*, 179 U. S. 287, cited by the Chief Justice, *supra*, the Court sustained an order of the State Commission which required the construction of a track connecting two intersecting railroads. It appeared from the established facts that on one of the lines there was an immense supply of wood, for which there was a great demand at points on the other, where there was none, and that if the connecting track were installed there would be a saving in time and freight on this large volume of business. It also appeared that many cattle were raised on one line, for which there were important markets on the other, and that without the track connection this cattle would have to be hauled over a much longer route, with a resulting loss in weight and value.

It was urged by the railroad that the judgment of the court below, which sustained the Commission order, was necessarily and inherently illegal, because upon the conceded facts it could only result in taking the railroad's property without due process of law, in refusing it the equal protection of the laws, and in

depriving it of its liberty to contract with such persons or corporations as it might choose. But the court thought not one of these objections was tenable, and held that the provision in question was

> a manifestly reasonable one, tending directly to the accommodation of the public, and in a manner not substantially or unreasonably detrimental to the ultimate interests of the corporation itself.

And although to carry out the judgment required the exercise by the railroad of the power of eminent domain, and resulted in some expense, yet neither fact furnished an answer to the application for the construction of the track connection.

Commenting on the *Jacobson* case, the Court said in *Oregon R. R. & N. Co.* v. *Fairchild*, 224 U. S. 510, 530—

> The advantage to the public was so great that the order requiring the track connection was sustained, in spite of the fact that one of the roads was thereby deprived of the revenue which it would otherwise have received for the longer haul.

In a later case, *Grand Trunk Ry.* v. *Mich. R. R. Comm.*, 231 U. S. 457, 469–470, the court said it had affirmed the order in the *Jacobson case* because it decided that *it was a proper exercise of the power of regulation of the business of the companies.* "The reasoning to sustain this conclusion," the court said,

> rested upon the ultimate proposition that railroad companies "are organized for the

> public interests and to subserve primarily the public good and convenience." And deciding this to be the purpose of the creation of the roads and that government had power to secure it, it was held that where a provision for regulation is reasonable and appropriate, when considered with regard to the interests both of the company and of the public, the legislation is valid and will furnish ample authority for the courts to enforce it, even though eminent domain must be exercised or cost incurred.

The same elements of public advantage that existed in the *Jacobson case* are present in the case now at bar, but the public advantage here is infinitely greater. Here the development of a whole state is largely dependent upon the construction of the track extension required by the order. It was urged by the State authorities, in support of the application for the extension—

> that Oregon's development, as compared with other States, has been held back and seriously hampered, due to the lack of direct routes to the markets for her products. (Rep., 635, R. 55.)

The Commission said that "the evidence of complainant and defendants brings out clearly and forcibly that no section can develop without transportation." And the Commission found that—

> The major portion of the State of Oregon is without adequate transportation facilities, and this is particularly true with respect to the portion which would be served by the proposed construction. (Rep., 635, R. 55–56.)

The Commission further found that the longer haul and greater time consumed over the present circuitous routes *renders it impossible to ship certain commodities of a perishable nature to what would be available markets if the shorter routes to be provided by the proposed extension were available.* (Rep. 635, R. 55.)

With the diminution of the available supply from the Southern States, the supply of standing timber in Oregon must be looked to by the whole country as of increasing and prime importance. (R. 1863.)

But on account of lack of adequate transportation facilities and the recurrence in the past of severe car shortages, "the marketing of Oregon timber is languishing in comparison with that of Washington and California." (Rep., 111 I. C. C. 21, R. 1861.)

The testimony of the Governor of the State of Oregon is significant in this connection. Governor Patterson testified that—

> Everyone knows that our development here has been much slower than that of either California or Washington, and I think, in common with most people, that lack of adequate transporation facilities has had a good deal to do with that. I might illustrate, if I may, with reference to our State road building program. Within the last 12 years we have spent more than a hundred million dollars in building roads, that is, State roads. The counties have built lateral roads with the assistance of the State, and market roads, and anybody in Oregon knows what that has meant to Oregon, the advancement that we

> have had from our road building in the State of Oregon. I can't help but liken that to railroad construction and railroad building.[21] (R. 1056.)

The facts seem ample to indicate the great public advantage which will follow the construction of the extension in question and establish the inherent reasonableness of the legislative requirement.

Since the *Jacobson case* was decided in 1900 the Interstate Commerce Act has been amended so as to confer exclusive jurisdiction upon the Interstate Commerce Commission over junctions between the main lines of railroads engaged in both interstate and local commerce. This was decided in *Alabama & Vicksburg Ry.* v. *Jackson & Eastern*, 271 U. S. 244, which pointed out that since then the authority of the Commission "has been greatly enlarged," with corresponding restriction of the power of the States over interstate carriers and that "prominent among the enlarged powers of the Federal Commission is the control conferred over construction and equipment of railroads, over their use by other carriers and, generally, over the relation of carriers to one another."

The court found that this exclusive jurisdiction had been vested in the Commission by virtue of paragraphs 18–20 of section 1, conferring power to authorize constructions or extensions of lines, of paragraph 21 authorizing the Commission "to re-

[21] Highway maps of Oregon are of record as Exhibit 15, part 2 (back), part 4, and part 4, back.

quire the carrier 'to extend its line or lines,'" and of paragraph 4 of section 3 empowering the Commission "to require one such carrier to permit another to use its terminal facilities 'including main-line track or tracks for a reasonable distance outside of such terminal.'" The court further found that "the only limitation" provided by the Transportation Act "upon the broad powers conferred upon the Commission over the construction, extension, and abandonment of the lines of carriers in interstate commerce, is that introduced as paragraph 22 of section 1," which excludes from its jurisdiction spur, industrial, team, switching, or side tracks, etc. And the court further pointed out that "the establishment of junctions between the main lines of independent carriers is commonly connected with the establishment of through routes and the interchange of car services, and is often but a step to the joint use of tracks. Over all of these matters the Commission has exclusive jurisdiction."

In *Chicago & N. W. Ry. Co.* v. *Ochs*, 249 U. S. 416, the Court sustained an order of the Minnesota Commission, requiring the carrier to construct an extension of a side track. The Court pointed out that as a common carrier a railroad company assumes and must discharge the obligations which inhere in the nature of the business. "Among these obligations," the Court said—

> is that of providing reasonably adequate facilities for serving the public. * * * To do this requires an expenditure of money, of course,

but the expenditure is for property which will belong to the company and be employed in its business. The money is not taken from the company and given to others, nor is the use of the facilities to be uncompensated.

Like other property employed by the company in the transportation of persons or property, the facilities have a real bearing on the rates which it is entitled to charge. Therefore an enforced discharge of the duty to provide such a facility [one reasonably adequate for serving the public] does not amount to a taking of property without compensation merely because it is attended with some expense. *Wisconsin, Minnesota & Pacific R. R. Co.* v. *Jacobson*, 179 U. S. 287, 302; *Minneapolis & St. Louis R. R. Co.* v. *Minnesota*, 193 U. S. 53; *Atlantic Coast Line R. R. Co.* v. *North Carolina Corporation Commission*, 206 U. S. 1, 26–27; *Missouri Pacific Ry. Co.* v. *Kansas*, 216 U. S. 262, 278–279; *Oregon R. R. & Navigation Co.* v. *Fairchild*, 224 U. S. 510, 529; *Michigan Central R. R. Co.* v. *Michigan Railroad Commission*, 236 U. S. 615, 631; *Chesapeake & Ohio Ry. Co.* v. *Public Service Commission of West Virginia*, 242 U. S. 603.

In other cases railroads have been required to extend or improve their facilities for serving the public, such as double tracking a line, *Phoenix Ry. Co.* v. *Geary*, 239 U. S. 277; erecting and maintaining depots, *Minneapolis & St. L. R. R.* v. *Railroad Comm.*, 193 U. S. 53; operating passenger train service, *Mo. Pac. Ry.* v. *Kansas*, 216 U. S. 262;

constructing and maintaining crossings, *N. & W. Ry.* v. *Pub. Ser. Comm.*, 265 U. S. 70; and the like.

(a) It was affirmatively shown that a large traffic is available for movement over the extension ordered, and that the construction of it will create additional traffic, and the commission found that the extension would be a valuable asset to the Union Pacific system. The validity of the order is not dependent upon the profitableness of the extension, considered separately from the remainder of the transportation system of which it will form a part.

As shown at length in the Commission's report (pages 639–662, R. 59–80), a large traffic is available for movement over the extension and much traffic will be created following its construction. The Commission found the traffic and revenue estimates submitted by complainants, when considered in connection with certain other probable sources of traffic, to be "lower than would actually follow after a reasonable development period." The Commission said:

> In neither the estimates of complainant nor defendants is any consideration given to the development which would follow short extensions or branches from the proposed construction. It is not reasonable to presume that such branches would not be constructed. Little attention has been given to traffic moving from the east to western Oregon and which would logically move via the proposed route. There is also substantial evidence that construction of feeder lines by other companies in western Oregon would follow construction of the proposed extension and that such lines would bring to the proposed line considerable traffic. (Rep. 662, R. 80.)

But while this affirmative showing was made, it seems that, as a matter of law, the order would not be invalid as taking the carrier's property, even if it were a conceded fact that the operation of the extension, considered separately, would result in pecuniary loss. In *Atlantic Coast Line* v. *N. Car. Corp. Comm.*, 206 U. S. 1, the carrier contended that to obey the order requiring rearrangement of the schedules necessitated the operation of an additional train, although such train could not be operated without a daily pecuniary loss, and that—

> the fact that some loss would result from the requirement that the extra train be operated, in and of itself, conclusively establishes the unreasonableness of the order and demonstrates that to give it effect would constitute a taking of property without due process of law in violation of the Fourteenth Amendment. (*Ibid.*, 23, 24.)

Overruling this contention the Court said, at page 26, that—

> as the primal duty of a carrier is to furnish adequate facilities to the public, that duty may well be compelled, although by doing so as an incident some pecuniary loss from rendering such service may result. It follows, therefore, that the mere incurring of a loss from the performance of such a duty does not in and of itself necessarily give rise to the conclusion of unreasonableness, * * *.

The Court further held that the fact that the furnishing of a necessary facility ordered may occasion

an incidental pecuniary loss is an important criterion to be taken into view in determining the reasonableness of the order, but it is not the only one.

> As the duty to furnish necessary facilities is coterminus with the powers of the corporation, the obligation to discharge that duty must be considered in connection with the nature and productiveness of the corporate business as a whole, the character of the services required, and the public need for its performance.

In *Mo. Pac. Ry. Co.* v. *Kansas*, 216 U. S. 262, it was held that an order directing a railroad company to run a regular passenger train over its line, instead of a mixed passenger and freight train, is not, even if such train is run at a loss, a deprivation of property without due process of law, or a taking of private property for public use without compensation; nor is such an order an unreasonable exercise of governmental control.

In *Phoenix Ry. Co.* v. *Geary*, 239 U. S. 277, an order of the Arizona Commission requiring a street railway company to double-track its line for a distance of ten blocks was sustained over the objections of the railway that the order was unjust and unreasonable because the service already rendered with the single track was adequate and efficient; that the construction of a double track was not required by the needs of the public; that the company's operating expenses exceeded its revenues, and that it was unable to make the additional expenditure required for the double

tracking, and that compliance with the order would prevent the company from making an adequate return, or any return at all, upon the value of its property.

In *Ches. & Ohio Ry.* v. *Pub. Service Comm.*, 242 U. S. 603, the Court upheld an order of the West Virginia commission requiring the carrier to operate passenger train service over a branch line theretofore devoted exclusively to freight. The Court said:

> One of the duties of a railroad company doing business as a common carrier is that of providing reasonably adequate facilities for serving the public. This duty arises out of the acceptance and enjoyment of the powers and privileges granted by the State and endures so long as they are retained. It represents a part of what the company undertakes to do in return for them, and its performance can not be avoided merely because it will be attended by some pecuniary loss. *Atlantic Coast Line Railroad Co.* v. *North Carolina Corporation Commission*, 206 U. S. 1, 26; *Missouri Pacific Ry. Co.* v. *Kansas*, 216 U. S. 262, 279; *Oregon Railroad & Navigation Co.* v. *Fairchild*, 224 U. S. 510, 529; *Chicago, Burlington & Quincy R. R. Co.* v. *Wisconsin Railroad Commission*, 237 U. S. 220, 229.

From an operating standpoint, the Court said, there was no serious obstacle to installing upon the branch line the service which the order required, but the curves and grades were such that particular attention necessarily would have to be given to

making the roadbed secure and to providing suitable devices for controlling the trains. Following this the Court used the language quoted below, to which especial attention is invited because of its particular relevancy to one phase of the case at bar:

> Isolatedly considered, such a passenger service would not presently be remunerative but would entail a pecuniary loss, and how long this would continue to be true can only be conjectured. But beyond this the effect from a revenue standpoint of installing such a service is not shown. It does not appear either that the company's intrastate passenger business in that State would not yield a reasonable return, or that the traffic, freight and passenger, passing over the branch line to and from points on the main line would not do so.

Despite the fact that the service ordered, *if separately considered*, could not be rendered without pecuniary loss, the Court found that the order was not repugnant to the due process and equal protection clauses of the Fourteenth Amendment.

In the state court's opinion it had been stated that the branch line, when constructed, "became an integral part of the extensive Chesapeake & Ohio system, and must be treated and controlled as such, and not merely as a segregated part of it."

So, in the case at bar, when the Crescent Lake extension is constructed, it will become an integral part of the extensive Union Pacific System, and must be

considered as such. This has been recognized by the Commission, which states, at page 663 of its report (R. 80–81):

> It is not necessary in establishing that the extension is reasonably required in the interest of public convenience and necessity to show that the extension would of itself, and considered as standing alone, earn sufficient revenues to make it profitable. The relation of the extension to the Union Pacific system and its possibilities as a developer of traffic for that system must be considered. We have recognized this principle in many cases. [Compare *Construction of Extension by O.-W. R. R. & Nav. Co.*, 86 I. C. C. 265; *Construction of Line by Wenatchee Southern Ry. Co.*, 90 I. C. C. 237.]

And the Commission found that the extension would be a valuable asset to the Union Pacific system:

> After careful consideration of complainant's and interveners' traffic and revenue estimates, and of defendants' criticisms thereof, we are firm in the belief that the extension would be a valuable asset to the Union Pacific system and would be an effective feeder for that system after a reasonable development period. At the same time the construction would bring about development in a vast territory. It would be of material benefit to the present Ontario-Burns branch. (R. 80).

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CONCLUSION

It is respectfully submitted that the decree of the court below should be reversed with directions to dismiss the bill for want of equity.

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OCTOBER, 1932.

APPENDIX

The Interstate Commerce Act provides:
Section 1 (9):

> Any common carrier subject to the provions of this Act, upon application of any lateral, branch line of railroad, or of any shipper tendering interstate traffic for transportation, shall construct, maintain, and operate upon reasonable terms a switch connection with any such lateral, branch line or railroad, or private side track which may be constructed to connect with its railroad, where such connection is reasonably practicable and can be put in with safety and will furnish sufficient business to justify the construction and maintenance of the same; and shall furnish cars for the movement of such traffic to the best of its ability without discrimination in favor of or against any such shipper. If any common carrier shall fail to install and operate any such switch or connection as aforesaid, on application therefor in writing by any shipper or owner of such lateral, branch line of railroad, such shipper or owner of such lateral, branch line of railroad may make complaint to the Commission, as provided in section thirteen of this Act, and the Commission shall hear and investigate the same and shall determine as to the safety and practicability thereof and justification and reasonable compensation therefor, and the Commission may make an order, as provided in section fifteen of this Act, directing the common carrier to comply with the provisions of this section in accordance with such order, and such order shall be enforced as hereinafter provided for

the enforcement of all other orders by the Commission other than orders for the payment of money.

Section 1 (18):

After ninety days after this paragraph takes effect no carrier by railroad subject to this Act shall undertake the extension of its line of railroad, or the construction of a new line of railroad, or shall acquire or operate any line of railroad, or extension thereof, or shall engage in transportation under this Act over or by means of such additional or extended line of railroad, unless and until there shall first have been obtained from the Commission a certificate that the present or future public convenience and necessity require or will require the construction, or operation, or construction and operation, of such additional or extended line of railroad, and no carrier by railroad subject to this Act shall abandon all or any portion of a line of railroad, or the operation thereof, unless and until there shall first have been obtained from the Commission a certificate that the present or future public convenience and necessity permit of such abandonment.

Section 1 (19):

The application for and issuance of any such certificate shall be under such rules and regulations as to hearings and other matters as the Commission may from time to time prescribe, and the provisions of this Act shall apply to all such proceedings. Upon receipt of any application for such certificate the Commission shall cause notice thereof to be given to and a copy filed with the governor of each State in which such additional or extended line of railroad is proposed to be constructed or operated, or all

or any portion of a line of railroad, or the operation thereof, is proposed to be abandoned, with the right to be heard as hereinafter provided with respect to the hearing of complaints or the issuance of securities; and said notice shall also be published for three consecutive weeks in some newspaper of general circulation in each county in or through which said line of railroad is constructed or operates.

Section 1 (20):

The Commission shall have power to issue such certificate as prayed for, or to refuse to issue it, or to issue it for a portion or portions of a line of railroad, or extension thereof, described in the application, or for the partial exercise only of such right or privilege, and may attach to the issuance of the certificate such terms and conditions as in its judgment the public convenience and necessity may require. From and after issuance of such certificate, and not before, the carrier by railroad may, without securing approval other than such certificate, comply with the terms and conditions contained in or attached to the issuance of such certificate and proceed with the construction, operation, or abandonment covered thereby. Any construction, operation, or abandonment contrary to the provisions of this paragraph or of paragraph (18) or (19) of this section may be enjoined by any court of competent jurisdiction at the suit of the United States, the Commission, any commission or regulating body of the State or States affected, or any party in interest; and any carrier which, or any director, officer, receiver, operating trustee, lessee, agent, or person, acting for or employed by such carrier, who knowingly authorizes, consents to, or permits any violation of the provisions of this

paragraph or of paragraph (18) of this section, shall upon conviction thereof be punished by a fine of not more than $5,000 or by imprisonment for not more than three years, or both.

Section 1 (21):

The Commission may, after hearing, in a proceeding upon complaint or upon its own initiative without complaint, authorize or require by order any carrier by railroad subject to this Act, party to such proceeding, to provide itself with safe and adequate facilities for performing as a common carrier its car service as that term is used in this Act, and to extend its line or lines: *Provided*, That no such authorization or order shall be made unless the Commission finds, as to such extension, that it is reasonably required in the interest of public convenience and necessity, or as to such extension or facilities that the expense involved therein will not impair the ability of the carrier to perform its duty to the public. Any carrier subject to this Act which refuses or neglects to comply with any order of the Commission made in pursuance of this paragraph shall be liable to a penalty of $100 for each day during which such refusal or neglect continues, which shall accrue to the United States and may be recovered in a civil action brought by the United States.

Section 1 (22):

The authority of the Commission conferred by paragraphs (18) to (21), both inclusive, shall not extend to the construction or abandonment of spur, industrial, team, switching or side tracks, located or to be located wholly within one State, or of street, suburban, or interurban electric railways, which are not operated as a part or parts of a general steam railroad system of transportation.

Section 5 (2):

Whenever the Commission is of opinion, after hearing, upon application of any carrier or carriers engaged in the transportation of passengers or property subject to this Act, that the acquisition, to the extent indicated by the Commission, by one of such carriers of the control of any other such carrier or carriers either under a lease or by the purchase of stock or in any other manner not involving the consolidation of such carriers into a single system for ownership and operation, will be in the public interest, the Commission shall have authority by order to approve and authorize such acquisition, under such rules and regulations and for such consideration and on such terms and conditions as shall be found by the Commission to be just and reasonable in the premises.

Section 6 (13):

When property may be or is transported from point to point in the United States by rail and water through the Panama Canal or otherwise, the transportation being by a common carrier or carriers, and not entirely within the limits of a single State, the Interstate Commerce Commission shall have jurisdiction of such transportation and of the carriers, both by rail and by water, which may or do engage in the same, in the following particulars, in addition to the jurisdiction given by the Act to regulate commerce, as amended June eighteenth, nineteen hundred and ten:

(a) To establish physical connection between the lines of the rail carrier and the dock at which interchange of passengers or property is to be made by directing the rail carrier to make suitable connection between its line and a track or tracks which have been constructed

from the dock to the limits of the railroad right of way, or by directing either or both the rail and water carrier, individually or in connection with one another, to construct and connect with the lines of the rail carrier a tract or tracks to the dock. The Commission shall have full authority to determine and prescribe the terms and conditions upon which these connecting tracks shall be operated, and it may, either in the construction or the operation of such tracks, determine what sum shall be paid to or by either carrier: *Provided*, That construction required by the Commission under the provisions of this paragraph shall be subject to the same restrictions as to findings of public convenience and necessity and other matters as is construction required under section 1 of this Act.

Section 15 (3):

The Commission may, and it shall whenever deemed by it to be necessary or desirable in the public interest, after full hearing upon complaint or upon its own initiative without a complaint, establish through routes, joint classifications, and joint rates, fares, or charges, applicable to the transportation of passengers or property, or the maxima or minima, or maxima and minima, to be charged (or, in the case of a through route where one of the carriers is a water line, the maximum rates, fares, and charges applicable thereto), and the divisions of such rates, fares, or charges as hereinafter provided, and the terms and conditions under which such through routes shall be operated; and this provision, except as herein otherwise provided, shall apply when one of the carriers is a water line. The Commission shall not, however, establish any through route, classification, or practice, or any rate, fare, or

charge, between street electric passenger railways not engaged in the general business of transporting freight in addition to their passenger and express business, and railroads of a different character; nor shall the Commission have the right to establish any route, classification, or practice, or any rate, fare, or charge when the transportation is wholly by water, and any transportation by water affected by this Act shall be subject to the laws and regulations applicable to transportation by water.

Section 15a (2):

In the exercise of its power to prescribe just and reasonable rates the Commission shall initiate, modify, establish or adjust such rates so that carriers as a whole (or as a whole in each of such rate groups or territories as the Commission may from time to time designate) will, under honest, efficient and economical management and reasonable expenditures for maintenance of way, structures and equipment, earn an aggregate annual net railway operating income equal, as nearly as may be, to a fair return upon the aggregate value of the railway property of such carriers held for and used in the service of transportation: *Provided*, That the Commission shall have reasonable latitude to modify or adjust any particular rate which it may find to be unjust or unreasonable, and to prescribe different rates for different sections of the country.

Section 15a (3):

The Commission shall from time to time determine and make public what percentage of such aggregate property value constitutes a fair return thereon, and such percentage shall be uniform for all rate groups or territories which may be designated by the Commission.

In making such determination it shall give due consideration, among other things, to the transportation needs of the country and the necessity (under honest, efficient and economical management of existing transportation facilities) of enlarging such facilities in order to provide the people of the United States with adequate transportation: *Provided*, That during the two years beginning March 1, 1920, the Commission shall take as such fair return a sum equal to 5½ per centum of such aggregate value, but may, in its discretion, add thereto a sum not exceeding one-half of one per centum of such aggregate value to make provision in whole or in part for improvements, betterments or equipment, which, according to the accounting system prescribed by the Commission, are chargeable to capital account.

Section 15a (4):

For the purposes of this section, such aggregate value of the property of the carriers shall be determined by the Commission from time to time and as often as may be necessary. The Commission may utilize the results of its investigation under section 19a of this Act, in so far as deemed by it available, and shall give due consideration to all the elements of value recognized by the law of the land for rate-making purposes, and shall give to the property investment account of the carriers only that consideration which under such law it is entitled to in establishing values for rate-making purposes. Whenever pursuant to section 19a of this Act the value of the railway property of any carrier held for and used in the service of transportation has been finally ascertained, the value so ascertained shall be deemed by the Commission to be the value

thereof for the purpose of determining such aggregate value.

The Commerce Court Act provides:

Section 1 (Section 209, Judicial Code, U. S. C. Tit. 28, Sec. 45):

> The jurisdiction of the Commerce Court shall be invoked by filing in the office of the clerk of the court a written petition setting forth briefly and succinctly the facts constituting the petitioner's cause of action, and specifying the relief sought. A copy of such petition shall be forthwith served by the marshal or a deputy marshal of the Commerce Court or by the proper United States marshal or deputy marshal upon every defendant therein named, and when the United States is a party defendant, the service shall be made by filing a copy of said petition in the office of the Secretary of the Interstate Commerce Commission and in the Department of Justice. Within thirty days after the petition is served, unless that time is extended by order of the court or a judge thereof, an answer to the petition shall be filed in the clerk's office, and a copy thereof mailed to the petitioner's attorney, which answer shall briefly and categorically respond to the allegations of the petition. No replication need be filed to the answer, and objections to the sufficiency of the petition or answer as not setting forth a cause of action or defense must be taken at the final hearing or by motion to dismiss the petition based on said grounds, which motion may be made at any time before answer is filed. In case no answer shall be filed as provided herein the petitioner may apply to the court on notice for such relief as may be proper upon the facts alleged in the petition. The court may, by rule, prescribe

the method of taking evidence in cases pending in said court; and may prescribe that the evidence be taken before a single judge of the court, with power to rule upon the admission of evidence. Except as may be otherwise provided in this chapter, or by rule of the court, the practice and procedure in the Commerce Court shall conform as nearly as may be to that in like cases in a district court of the United States.

Section 2 (Section 210, Judicial Code, U. S. C. sup. V, Tit. 28, Sec. 47a):

A final judgment or decree of the Commerce Court may be reviewed by the Supreme Court of the United States if appeal to the Supreme Court be taken by an aggrieved party within sixty days after the entry of said final judgment or decree. Such appeal may be taken in like manner as appeals from a district court of the United States to the Supreme Court, and the Commerce Court may direct the original record to be transmitted on appeal instead of a transcript thereof. The Supreme Court may affirm, reverse, or modify the final judgment or decree of the Commerce Court as the case may require. Appeal to the Supreme Court, however, shall in no case supersede or stay the judgment or decree of the Commerce Court appealed from, unless the Supreme Court or a justice thereof shall so direct; and appellant shall give bond in such form and of such amount as the Supreme Court, or the justice of that court allowing the stay, may require. An appeal may also be taken to the Supreme Court of the United States from an interlocutory order or decree of the Commerce Court granting or continuing an injunction restraining the enforcement of

an order of the Interstate Commerce Commission, provided such appeal be taken within thirty days from the entry of such order or decree. Appeals to the Supreme Court under this section shall have priority in hearing and determination over all other causes except criminal causes in that court.

Section 4 (Section 211, Judicial Code, U. S. C. Tit. 28, Sec. 48):

All cases and proceedings in the Commerce Court which but for this chapter would be brought by or against the Interstate Commerce Commission, shall be brought by or against the United States, and the United States may intervene in any case or proceeding in the Commerce Court whenever, though it has not been made a party, public interests are involved.

Section 5 (Section 212, Judicial Code, U. S. C. sup. V, Tit. 28, Sec. 45a):

The Attorney General shall have charge and control of the interests of the Government in all cases and proceedings in the Commerce Court, and in the Supreme Court of the United States upon appeal from the Commerce Court. If in his opinion the public interest requires it, he may retain and employ in the name of the United States, within the appropriations from time to time made by the Congress for such purposes, such special attorneys and counselors at law as he may think necessary to assist in the discharge of any of the duties incumbent upon him and his subordinate attorneys; and the Attorney General shall stipulate with such special attorneys and counsel the amount of their compensation, which shall not be in excess of the sums appropriated therefor by Congress

for such purposes, and shall have supervision of their action: *Provided*, That the Interstate Commerce Commission and any party or parties in interest to the proceeding before the commission, in which an order or requirement is made, may appear as parties thereto of their own motion and as of right, and be represented by their counsel, in any suit wherein is involved the validity of such order or requirement or any part thereof, and the interest of such party; and the court wherein is pending such suit may make all such rules and orders as to such appearances and representations, the number of counsel, and all matters of procedure, and otherwise, as to subserve the ends of justice and speed the determination of such suits: *Provided further*, That communities, associations, corporations, firms, and individuals who are interested in the controversy or question before the Interstate Commerce Commission, or in any suit which may be brought by any one under the provisions of this chapter, or the Acts of which it is amendatory or which are amendatory of it, relating to action of the Interstate Commerce Commission, may intervene in said suit or proceedings at any time after the institution thereof; and the Attorney General shall not dispose of or discontinue said suit or proceeding over the objection of such party or intervenor aforesaid, but said intervenor or intervenors may prosecute, defend, or continue said suit or proceeding unaffected by the action or non-action of the Attorney General therein.

Section 5, last paragraph (Section 213, Judicial Code, U. S. C., sup. V, Tit. 28, Sec. 45a):

Complainants before the Interstate Commerce Commission interested in a case shall

have the right to appear and be made parties to the case and be represented before the courts by counsel, under such regulations as are now permitted in similar circumstances under the rules and practice of equity courts of the United States.

The Act of February 13, 1925 (c. 229, 43 Stat. 93, 938) provides:

A direct review by the Supreme Court of an interlocutory or final judgment or decree of a district court may be had where it is so provided in the following Acts or parts of Acts, and not otherwise:

* * * * *

"(4) So much of 'An Act making appropriations to supply urgent deficiencies in appropriations for the fiscal year 1913, and for other purposes,' approved October 22, 1913, as relates to the review of interlocutory and final judgments and decrees in suits to enforce, suspend, or set aside orders of the Interstate Commerce Commission other than for the payment of money."

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